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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1556

COLON BROWN and J. P. NICELY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Colon Brown and J. P. Nicely, pursuant to Rule 46 of the Rules of this Court jointly pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in these proceedings on January 6, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 1a) has been reported at 550 F.2d 115 (3rd Cir. 1977).

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on January 6, 1977. A timely petition for rehearing filed by the respondent was denied on March 10, 1977. On March 31, 1977, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to May 9, 1977. This petition for certiorari is filed within that extended period. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the failure of the Respondent to introduce any evidence at trial connecting either petitioner with participation during the statutory period in a conspiracy charged under 15 U.S.C. § 1 required that the Court of Appeals for the Third Circuit reverse the judgment of the District Court and enter an order acquitting the petitioners.

2. Whether fundamental fairness and the Due Process Clause were violated when the courts below effectively gave erroneously retroactive application to this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969).

STATUTES INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Code, Title 15:

> § 13(b). "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

United States Code, Title 15:

> § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

United States Code, Title 18:

> § 3282. *Offenses Not Capital.* "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Rules of the Supreme Court of the United States:

> Rule 46. "Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or

a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition."

STATEMENT OF THE CASE

Colon Brown

From January 1, 1965, to the time of his indictment on December 27, 1973, Colon Brown was Chairman of the Board and Chief Executive Officer of the National Gypsum Company, a producer of Gypsum wallboard. On December 27, 1973, he, along with some other defendants, both individual and corporate, was indicted for allegedly having conspired to violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by fixing the price, terms, and conditions of sale of gypsum board products. Nearly 36 months were consumed by grand jury proceedings alone. Following a trial in excess of four months resulting in a transcript of over 15,000 pages, a jury entered a verdict of guilty as to all defendants. From this verdict, Petitioner Brown sought review by the Third Circuit arguing that the evidence presented at trial was insufficient to support the verdict. In the alternative he requested a new trial because the trial court committed numerous errors of law, failed to discharge the jury in light of the repeated misconduct of the prosecution, and coerced the hopelessly deadlocked jury.

On January 6, 1977, the Third Circuit agreed that prejudicial errors had occurred and thus the judgment of conviction was reversed and the case was remanded to the trial court. In doing so, however, the Third Circuit ignored Judge Hunter's own significant observation that the only possible references which might conceivably link Colon Brown to a price-fixing conspiracy was for a period almost three years prior to the beginning statutory period. (Appendix p. 27a).

The evidence shows without dispute that Colon Brown prior to January 1, 1965, had nothing whatsoever to do with the pricing or sale of gypsum products. His entire experience during his years of employment with the National Gypsum Company had been with other product lines and in positions related only to the manufacture and shipping of such products. Between January 1, 1965, and the commencement of the relevant period under the statute of limitations, December 27, 1968, the evidence presented against Colon Brown fell into three categories discussed below. Even so, very little in the voluminous record of the case even referenced Colon Brown. The scarce mentions of him were legally innocuous. No witness testified as to any meetings, telephone conversations, or correspondence in which he engaged in any discussions with competitors about the pricing of gypsum products. His own sworn and unrefuted testimony explains fully the legally valid purpose of any occasion on which he communicated with officials of other companies engaged in the manufacture and sale of gypsum. The prosecution made no slightest effort to produce witnesses or documents that might cast any doubt on these explanations. Accordingly, the purported case against Colon Brown consisted solely of the prosecutor's innuendo and surmise and failed utterly to meet the minimum standards of probative evidence.

First, in an effort to connect Colon Brown with an alleged agreement among competitors to increase the price of gypsum wallboard effective December 15, 1965, the prosecution introduced calendar entries and rec-

ords showing that Colon Brown had some meetings and telephone contacts earlier in 1965 with officials of the United States Gypsum Company. But no evidence of any kind was introduced to show that these ever involved discussions of gypsum wallboard pricing. The only evidence in the record with regard to those meetings established their wholly lawful nature and purpose. (App. p. 154a-161a).

Second, in an effort to connect Colon Brown with an alleged agreement to change terms of credit effective March 1, 1966, the prosecution was able to argue only that in August of 1965 Mr. Brown had authorized a study of National Gypsum Company's credit terms and that, in a quite unremarkable coincidence, one followup memorandum in a series of internal National Gypsum memoranda to and from Mr. Brown in connection with this credit study was dated December 10, 1965, a date on which his calendar showed the name of Mr. Fredericks, then with the Bestwall Division of Georgia-Pacific Corporation. Neither Colon Brown nor Mr. Fredericks remembered any such meeting. (App. p. 195a).

Totally lacking in the record is any indication that National's study of credit problems was initiated pursuant to any discussions with competitors or for reasons other than those completely internal to the National Gypsum Company. There was no testimony offered and no document presented to prove that Colon Brown ever talked with a competitor about credit terms in the sale of gypsum wallboard.

In the end, the prosecution's case against Petitioner Colon Brown was reduced to the argument that he was Chairman of the Board and Chief Executive Officer

of National Gypsum Company during a period when one or more of the Corporation's employees, in accordance with open policy followed pursuant to advice of outside legal counsel, on occasion called a competitor to verify a customer's report that the competitor had offered lower competitive prices or more advantageous terms and conditions of sale. As was documented fully at the trial, such action—popularly referred to as "verification"—was undertaken: (a) to ensure compliance with the requirements of the Robinson-Patman Act by establishing a bona fide basis for extending a lower price to meet a reported lower price offered by a competitor, 15 U.S.C. § 13(b); or (b) to prevent customer fraud. Virtually every witness who testified to a purpose for price verification in the gypsum industry, including Petitioner Brown, cited the reasons of Robinson-Patman compliance or protection from customer fraud, or both.[1]

The great bulk of the Respondent's evidence presented as to all defendants at the trial related to the period prior to December 27, 1968, and thus prior to the time Petitioner could be held responsible under the antitrust laws. None of this evidence succeeds even remotely in connecting Petitioner with any unlawful conspiratorial conduct. For the period relevant to a criminal trial based on an indictment issued on December 27, 1973, there is an absolute absence of any evidence even purporting to implicate Colon Brown in any conspiracy to violate the antitrust laws.

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[1] See the testimony of witnesses:

Bean, App. 58a-59a; Simpson, 60a-61a; Gimlin, 62a-65a; McCaskill, 66a-67a; Burch, 68a-69a; A. L. Meyer, 70a-71a; Sikes, 27a-74a; Atwell, 80a-82a; Montgomery, 90a-92a; Galvin, 93a-95a; Hayes, 96a-97a; Thompson, 98a-108a; Fisch, 109a-113a; and the individual defendants: Watt, 114a-115a; and Brown, 168a-169a.

In any event the central issue of the case was verification. Yet the record shows, without question, that verification had first taken place long before Colon Brown became Chairman of the Board or had anything to do with the entire company's pricing procedures. In the four years after he became Chairman of the Board and before National ceased verifying, there is no instance shown by the record in which Petitioner Brown ever made or requested a verification call to a competitor. Nothing in the record establishes that he supervised such calls or had any knowledge of their extent.

Colon Brown's sworn testimony was that he had nothing to do with competitive price verification and that he did not even learn of its existence until 1968 shortly before the practice was discontinued by the National Gypsum Company. (App. p. 151a-152a). Mr. Atwell, who was the National officer authorized to make verification calls, did not recall ever talking to Mr. Brown about them. (App. p. 75a-76a). Nor is there proof of any kind that Colon Brown even knew what, if anything, other gypsum wallboard producers did with respect to verification of customers' reports of competitive pricing. The record shows that company policy required cessation of price verification with competitors in January of 1969. (App. p. 89a; 131a-132a). There is no evidence that Colon Brown knew of a single verification call by National Gypsum Company thereafter or, indeed, at any time within the statute of limitations. The unimportance of verification to Colon Brown is obvious from the evidence that in December of 1969 his assistants were unsure that he even knew that these calls had been stopped in January of that year. (App. p. 83a-86a; GX-25, App. p. 174a).

J. P. Nicely

Unlike any of the other several appellants to the Third Circuit Court of Appeals, Petitioner J. P. Nicely did not seek the alternative of a new trial. Instead, Mr. Nicely chose to base his appeal on the single compelling fact that after over four months of trial it was painfully obvious that he had been mistakenly indicted. There was an utter absence of evidence even to suggest that Petitioner Nicely had participated in the conspiracy charged. Yet presented with only this request for acquittal because of insufficient evidence, the Court of Appeals somehow ignored the basis for Mr. Nicely's appeal and the clear statement that he did not seek a new trial and instead reversed and remanded his case to the trial court. By ignoring the clear thrust of his appeal, the Court of Appeals was in error.

The evidence presented at trial failed completely to implicate Petitioner Nicely even as a participant in most of the fragmented and sporadic events which the prosecution portrayed as elements in a price-fixing conspiracy. There was as to Mr. Nicely no evidence that he had even opportunities to reach agreements or understandings with competitors that could conceivably have violated the antitrust laws.

Petitioner Nicely was a sales specialist for National Gypsum Company. Throughout his employment with the Company he spent at least 60 percent of his time in the field calling on customers. (App. p. 118a-119a). His responsibility was for sales, not for pricing. This specialized nature of his service is further demonstrated by Mr. Nicely's position with the Company. During the statutory period he was not even a corporate officer.

He was instead a "Vice President, Sales" for the Gold Bond Building Products Division. (App. p. 117a). He had no official pricing authority.

Mr. Nicely, while fulfilling his specialty of calling on dealer customers of the Division during his term as a sales vice-president, had no occasion to meet with his competitors or to discuss industry matters with them either in person, by telephone, or through correspondence. His infrequent contacts with representatives of National's competitors were limited to casual greetings at customers' conventions and the occasional negotiation of intra-industry sales with procurement personnel. (App. p. 135a-136a). Apart from one dinner in 1954 or 1955, he never attended a meeting of the Gypsum Association, one touchstone of the Government's case, and never received any reports about such meetings. (App. p. 136a-137a).

As to the elements of the prosecution's case to which the bulk of its evidence was directed, Petitioner Nicely appears only as a peripheral participant. Moreover, all the meager attempts to link him to the major events supposedly constituting the conspiracy were well prior to the beginning of the statutory period. For instance, the prosecution's opening statement described the December 15, 1965, price increase, three years prior to the statutory period, as one of the most important elements of its case. Yet on this assertedly key element, no evidence of improper conduct by Petitioner Nicely was ever introduced. The prosecution's evidence against Mr. Nicely relating to this price increase was confined to its confused questioning with regard to a series of so called "Plan of Action" documents (GX 500-502, App. p. 176a-178a). Mr. Nicely participated in the preparation of these documents which undisputed evidence proved were developed by National in reaction to learning on November 17, 1965, of a surprise announcement by United States Gypsum Company ("USG") of a price increase. Those documents constituted National's efforts to implement an independent business decision to follow USG's price increase. (App. p. 77a, *et seq.*; p. 137a; p. 141a, *et seq.*; p. 162a, *et seq.*).

Although National and other industry members followed USG's lead, such action is not indicative of collusion. It is completely consistent with competition. Parallel pricing action is not proof of conspiracy even in a civil case against a corporation. It has no probative value in a criminal case against an individual. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

In any event, Mr. Nicely did not make the decision to follow USG's price increase. He received no advance word of the change (App. p. 137a), and participated only to the extent that he followed the orders of his superior, National's President, Mr. Manske. (App. p. 143a; p. 146a-147a; p. 149a-153a). No evidence was ever presented to offer even the slightest challenge to Petitioner Nicely's testimony that this was his sole connection with the 1965 price change.

The prosecution also offered evidence to link Petitioner Nicely with another pre-statutory period incident involving a March, 1966, change in credit terms even though Mr. Nicely had no authority in this area other than to indicate whether from a Sales Department standpoint proposed changes were acceptable. (App. p. 138a-139a). On the record presented below there was nothing which could connect Mr. Nicely in

any way with a conspiracy to fix credit terms, even if one had been shown to exist. Absolutely no evidence was offered to place him at meetings, discussions, or in correspondence with competitors about credit matters.

A third and perhaps the major area of allegedly conspirational activity was the antitrust policy of the National Gypsum Company permitting direct verification with competitors of customers' claims of lower prices. This policy was already in effect when, on February 25, 1964, Mr. Nicely became Vice-President, Sales-East located in Buffalo. (App. p. 116a). He was unable to testify when verification calls began. (App. p. 127a-128a). He testified without contradiction that he had no direct participation in verification, that he never made a verification call to a competitor or received one from a competitor, and, that he never talked to a competitor about verification of a price. He testified further that he never gave instructions to anyone else with regard to verification of prices with competitors and never asked any employee of National Gypsum Company to make a verification call. (App. p. 127a-128a, 134a; p. 140a).

Moreover, the sole initiative taken by Petitioner Nicely with respect to verification was to suggest to Mr. Kenneth Atwell that the practice of verification be discontinued when, in January, 1969, he read of this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). (App. p. 132a-133a).

It is clear that Petitioner Nicely had no role in verification other than to question in light of the *Container* case whether it should continue. There was no evidence that he made or received verification calls. Neither was he shown ever to have supervised procedures for

such calls or to have received reports of their results. He vigorously denied any participation in verification other than his suggestion that it be terminated, and no witness was shown to have made a verification call to or received one from Mr. Nicely.

Even the Government's prosecutor finally appeared to recognize Mr. Nicely's lack of involvement. When objecting to a line of questions directed to Mr. Nicely on the verification issue, he stated: "Objection, Your Honor. Mr. Warnke has asked a series of questions now as to this man's understanding of the practices [verification] which he wasn't even engaged in he said." (App. p. 129a-130a). The objection was sustained. (*Id.*)

Perhaps the prosecution's most outrageous effort to build a case against Petitioner Nicely where none existed was its allegation of predatory conduct allegedly designed to discourage the competition of single-plant producers. That specious effort by the prosecution related to Mr. Claude Huckleberry in his operation of Texas Gypsum Company in the early 1960's. The dominant theme of Mr. Huckleberry's testimony at trial was that he had some inherent right to take over the customers of other gypsum producers in the Texas market without competitive reaction. (*E.g.*, App. p. 194a). Adopting this theme in its effort to convict Mr. Nicely, the prosecution strained to attach significance to a sales call he made on a Texas customer in 1962, over six years prior to the statutory period. Mr. Nicely's call was on Groves Lumber Company in Dallas, Texas, where he had a conversation with its manager, Mr. John D. Tinsley. The offer of proof led the trial judge aptly to characterize the Tinsley testi-

mony as something "less than earthshaking." (Tr. 2521).

Nonetheless, the trial court admitted and then refused to strike the Tinsley testimony over defense objection that this unremarkable incident, occurring over 13 years prior to trial, was irrelevant and immaterial to any issue of the case in that it did not tend to prove the existance of a price-fixing conspiracy. The Court of Appeals also ignored this prejudicial and improper testimony.

The evidence which was introduced through Mr. Tinsley certainly fell far short of what the prosecution had promised in its opening statement and offer of proof. It was shown only that Mr. Nicely, accompanied by one of National's local sales representatives in Dallas, visited the Groves Lumber Company among other customers on March 22, 1962. For some years Groves had been a customer of National, but, prior to Mr. Nicely's visit, had dropped National and had begun to purchase from Texas Gypsum Company. (App. p. 192a-193a). The Dallas-Fort Worth market was an important one for National, as it was for many of the other manufacturers of gypsum wallboard. It was therefore, entirely reasonable, as Mr. Tinsley readily admitted, for National and its sales force to want the Groves account back again. Also, just prior to Mr. Nicely's visit the salesman who had formerly handled the Groves account had left National's employment, thereby giving another reason for Mr. Nicely's call to reestablish communication. (*Id.*).

The essence of the prosecution's contention that this normal business call was in some way predatory involved a conversation Mr. Nicely had with Mr. Tinsley.

Mr. Tinsley confirmed the substance of the conversation which occurred between them. It was also described in DX (Nicely)-1 (App. p. 179a-180a), a sworn statement by Mr. Nicely dated August 24, 1964, only two years after the conversation. Mr. Tinsley remembered the use of three words—"policy of containment" —which were alleged to have some predatory significance. However, a review of Mr. Nicely's statement and his testimony makes clear that he was merely giving his opinion on the reason why United States Gypsum Company, a competitor of both National and Texas Gypsum, would not willingly surrender its business. (App. p. 124a-126a). It certainly could not have involved any conspiracy including Mr. Nicely or National Gypsum because, as paragraph (d)(i) of the exhibit shows, National was not even meeting the competition of Texas Gypsum at the time.

There was no evidence to refute Mr. Nicely's sworn testimony that he never discussed his call on Groves Lumber Company with any competitor, before or after the event. His uncontested testimony was that when he went to Dallas he had no plans to call on Groves Lumber and had no prior knowledge that Texas Gypsum was selling in the area. When the Tinsley incident is reduced to its essentials, it is nothing more than one of several visits by Mr. Nicely, then a Central Division Sales Manager—Eastern Area, seeking to regain a lost National account. Its receipt in evidence was error, as was its retention, since it proves no part of the alleged conspiracy. (App. p. 120a-126a).

Objective analysis of the entire record requires the conclusion that Mr. Nicely must be acquitted. The record was ignored by the Court of Appeals even though it was Petitioner Nicely's request that as to him

this was the only issue to be considered. Ordering that he be sent back to the District Court for retrial provides no remedy. As in any mass conspiracy trial, a serious risk exists that stale or irrelevant evidence as to Mr. Nicely might be considered by the jury as bearing on the issue of his guilt or innocence. The utter absence of evidence of Mr. Nicely's guilt at the first trial failed to protect him from this danger. A retrial would merely subject him to a rehashing of what is obviously not evidence of guilt—merely an improper case of guilt by implication.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals To Reverse and Remand for a New Trial Erroneously Ignored the Total Absence of Any Evidence To Implicate Either Colon Brown or J. P. Nicely During the Statutory Period in a Conspiracy To Violate the Antitrust Laws.

The question before this Court is very similar to that which it faced in the case of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960): are the charges against petitioners so totally devoid of evidentiary support as to render the conviction unconstitutional? In *Thompson* this Court observed that the "[d]ecision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."

As a matter of law, both Mr. Nicely and Mr. Brown were entitled to be judged solely on the evidence applicable to them. See *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947); *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Marchisio*, 344 F.2d 653, 666 (2d Cir. 1965). As to each petitioner, the Constitution and laws of the United States require

that the evidence be considered separately to determine first if the alleged conspiracy existed and, if so, whether each petitioner was a knowing participant. Here, whatever might be concluded with respect to others involved in the trial, there is nothing whatsoever to show that either Colon Brown or J. P. Nicely participated in any conspiracy of any kind. Under established principles of law, as embodied in Rule 29 of the Federal Rules of Criminal Procedure, the District Court was thus required to order the entry of judgment of acquittal. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787 (1946); *Mortensen* v. *United States*, 322 U.S. 369, 374 (1944); *Parker* v. *United States*, 378 F.2d 641 (1st Cir. 1967), *cert. denied*, 389 U.S. 842 (1967); *Conaway* v. *United States*, 349 F.2d 907 (8th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); *United States* v. *Sawyer*, 294 F.2d 24 (4th Cir. 1961), *cert. denied*, 368 U.S. 916 (1961); *United States* v. *Allard*, 240 F.2d 840 (3d Cir. 1957), *cert. denied*, 353 U.S. 939 (1957); *Curley* v *United States*, 160 F.2d 229 (D.C. Cir. 1947), *cert. denied*, 331 U.S. 837 (1947).

Colon Brown

The record in the District Court established that as to Petitioner Brown evidence of participation in a conspiracy for which he could be adjudged guilty is non-existent. As specifically recognized by Judge Hunter, author of the majority opinion below, the only *possible* evidence relating to Colon Brown concerned episodes predating the statutory period by almost three years. Clearly very little in the voluminous record of this case even had reference to Colon Brown. The scarce mentions of him were legally innocuous. No witness testified as to any meetings, telephone conversations or correspondence in which he engaged in any

discussions with competitors about the pricing of gypsum wallboard. His own sworn and unrefuted testimony explains fully the legally valid purpose of any occasion on which he met with officials of the other companies engaged in the manufacture and sale of gypsum wallboard. (App. p. 153a, *et seq.*). The Government made no consequential effort to produce witnesses or documents that might cast any doubt on these explanations.

In one of the rare references to Colon Brown in his opening statement, the prosecutor announced to the jury: "you will learn from the evidence how [he], too, attempted to, whenever and wherever possible to seek agreement with [his] competitors, in fact, did effect and obtain an agreement with [his] competitors, on terms and conditions of sale." (App. p. 192a). No such evidence was ever presented. Instead, Colon Brown was convicted, not by evidence of illegal conduct on his part, since none existed, but by errors which prejudiced all of the defendants and by the trial court's failure to honor Petitioner Brown's constitutional protection against improper imputation or transference of guilt in this multi-party conspiracy trial which, according to the Government's contentions, involved over 160 co-conspirators. Accordingly, the case against Colon Brown consisted solely of the prosecutor's innuendo and surmise which failed totally to meet even the most minimum standards of probative evidence.

It was alleged that Petitioner Brown had conspiratorial contacts with officials of another gypsum manufacturers. Not only is there no evidence of price-fixing discussions, but there is complete and uncontroverted evidence that the only and lawful purpose of these contacts which occurred in 1965 was to settle under

court deadline longstanding patent litigation involving the potential loss to his company of millions of dollars and settled through his efforts for under $200,000.

There was further innuendo with respect to a March 1966 change in credit terms. Rather than being indicative of conspiracy, the record shows only that this stale event was one in which Petitioner Brown acted in the independent business interest of his own company and is devoid of anything proving collusion with competitors.

And, of course, there was price verification. Petitioner Brown did not initiate, supervise or receive reports of verification calls, and the practice was discontinued under his Chairmanship as soon as the legal question was raised by outside counsel after the Supreme Court's decision in the *Container* case.

The only pertinent evidence with regard to the charge that Colon Brown engaged in an antitrust conspiracy is his own sworn testimony categorically denying the allegation. No testimony and no documents refute his denial. None indeed presents even minor inconsistency with his testimony.

Perhaps it was this absence of evidence which caused the jury foreman—prior to the time the trial court coerced the verdict—to tell the court that in his opinion the jury was hopelessly deadlocked: "We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony." (App. p. 172a-173a).

For reasons not expressed, the Third Circuit failed to order the acquittal of Colon Brown despite the fatal deficiency in the evidence. This failure is in direct con-

flict with this Court's holdng that "[i]t is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Vachon* v. *New Hampshire*, 414 U.S. 478, 480 (1974), citing *Harris* v. *United States*, 404 U.S. 1232, 1233 (1971). (Douglas, J., in chambers); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Johnson* v. *Florida*, 391 U.S. 596 (1968). The failure of the Third Circuit to exercise its responsibility and protect Petitioner Colon Brown's due process rights deserves the attention of this Court.

J. P. Nicely

As a review of the trial record makes painfully clear, there was as to Mr. Nicely no basis for any trial on the charges or issues involved in this case. No evidence relevant to the charge that he violated the antitrust laws was presented in the nineteen weeks of the trial. Apart from his own testimony and the prosecution's improper introduction of testimony concerning the routine sales call he made to John D. Tinsley of Groves Lumber Company in March of 1962, the over 15,000 pages of transcript are devoid of meaningful references to him.

In the prosecution's opening statement at the trial there were a few and highly general references to Petitioner Nicely. However, the follow-up in the prosecution's proof was conspicuous by its absence. At page 218 of the trial transcript, the prosecution purported to link Mr. Nicely to a Gypsum Association Task Force claimed to be "a cover-up so that these defendants could get together and agree on terms and conditions of sale." Nothing in the evidence introduced by the prosecution indicated that Mr. Nicely had

anything whatsoever to do with any "Task Force," regardless of its nature, or indeed with any Gypsum Association unit or activity.

The prosecution in its opening statement alleged further: "You will learn from the evidence how [Mr. Nicely], too, attempted to, whenever and wherever possible, to seek agreement with [his] competitors, in fact, did effect and obtain an agreement with [his] competitors." (App. p. 192a). There was no evidence ever offered to deliver on the prosecutor's pledge.

In its opening statement the prosecution also described the December 1965 price increase as one of the most important elements of its case. On this assertedly key element, no evidence at all of any improper conduct by Mr. Nicely was introduced. Neither was any evidence offered to place Mr. Nicely at meetings with competitors or as a participant in telephone conversations with competitors relating to price changes. As to him even "opportunity evidence" was lacking. Moreover, the decision for National to follow United States Gypsum's lead in the 1965 price change was not Mr. Nicely's decision. Mr. Nicely's only role was to carry out the directions of his superior, Mr. Manske. (App. p. 143a-153a).

Called as a witness in his own defense, Mr. Nicely testified fully and freely as to the facts involved in each of the few episodes for which evidence was introduced concerning him. The extensive cross-examination served only to confirm the truth of his denials of any complicity in conduct violative of the antitrust laws. No rebuttal witnesses were called in an effort to challenge this testimony. No witness and no document presented by the prosecution was even relevant to the

issue of Mr. Nicely's guilt or innocence of the charges brought against him. The record, therefore, demonstrates that he has been wrongly accused.

Given this dearth of evidence, risk is inescapable here that even the mere review of the prosecution's feeble efforts to connect Mr. Nicely with events on which the alleged conspiracy is based may magnify the "case" against him to a degree it does not deserve. It should be remembered, therefore, that the matters discussed in this petition constitute the prosecution's entire case against J. P. Nicely—a case that flagrantly fails to meet the criterion of proof of guilt beyond a reasonable doubt.

Summary

As to both of these petitioners, Brown and Nicely, there is no evidence of participation in a conspiracy to violate antitrust laws. Moreover, the very few references to each of them were for incidents far prior to the statutory period. The statute of limitations which is applicable to the offense with which Petitioners were charged is found at 18 U.S.C. § 3282 and reads as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

The Indictment was returned on December 27, 1973. Thus the statutory period began to run on December 27, 1968. The record below, however, demonstrated conclusively that for this statutory period there is an absolute absence of any evidence even purporting to implicate either Colon Brown or J. P. Nicely in any conspiracy to violate the antitrust laws. As this Court observed in *Toussie* v. *United States,* 397 U.S. 112, 114-15 (1970):

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

For the pertinent five years, not even so-called "opportunity evidence" exists to support the charge that Petitioners conspired to fix prices and terms and conditions of sale. Perhaps the best evidence of this comes from the prosecution itself. A pleading signed by the chief prosecutor and filed with the trial court was represented as showing "Price-Fixing Discussions Within the Statutory Period." Neither that document nor a supplement to it even mentioned the name of either Colon Brown or J. J. Nicely. (App. p. 196a-199a).

The key elements of the prosecution's case were all before the statutory period. The December, 1965, price change was three years prior to it. The March 1966 credit change was two and one-half years prior thereto. Verification, even if it were improper, ended within

the first month of the statutory period and Petitioner Nicely was at least partially responsible for alerting his Company to the questions raised by this Court's decision in *Container*. And, of course, the most prejudicial and improper pre-statutory period submission by the prosecution related to the 1962 sales call on Tinsley by Mr. Nicely which occurred fully six and one-half years prior to the statutory period.

The failure of the respondent to introduce any evidence at trial connecting either of these petitioners with participation during the statutory period in a conspiracy charged under 15 U.S.C. § 1 required that the Court of Appeals for the Third Circuit reverse the judgment of the District Court and enter an order acquitting the petitioners. The failure to do so requires review by this Court.

2. By Effectively Perpetuating the Erroneously Retroactive Application Given by the Trial Court to United States v. Container Corp., 393 U.S. 333 (1969), the Court of Appeals Violated the Due Process Clause of the Constitution.

As the Court of Appeals noted, the central theme of the Respondent's case was the issue of "verification." In those instances when confirmation could not be obtained in other ways an employee of one gypsum board manufacturer would occasionally telephone a competitor to determine the price at which the competitor was offering gypsum board to a specific customer. Virtually every witness who testified during the trial about the purposes of verification established overwhelmingly that those purposes were fraud protection, Robinson-Patman Act compliance, or both. Indeed, National Gypsum Company had a compilation of legal guidelines cleared by outside counsel which specifically approved the practice of checking with competitors to

verify a competitive situation which would justify, under the Robinson-Patman Act, meeting a lower competitive price or more favorable terms. (DX (NG)-77, App. p. 182-191a).[2]

This policy was based upon prior decisions of this Court which approved of such exchanges among competitors under certain controlling circumstances. In *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925), the Sherman Act was held to permit the exchange of average cost data relating only to closed transactions, despite an apparent stabilizing effect on price, where no intent to constrain individual competitive activity was found. Further, the Court in *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925) approved the exchange of specific price information concerning specific customers, despite possible effects on prices, where the purpose of the dissemination scheme was to prevent buyers from defrauding sellers.

In mid-January 1969, after the Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). National decided, as a matter of company policy and on the advice of outside legal counsel, to discontinue

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[2] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) permits a *prima facie* showing of price discrimination to be rebutted or justified by the seller—

> "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The Act emphasizes, however, that:

> "*the burden of rebutting* the prima-facie case thus made by showing justification *shall be upon the person charged* with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. . . ." (Emphasis added).

any verification calls to competitors. The decision was made because *Container* cast at least some doubt on whether any verification of competitive discounts should continue.

National apparently exercised good judgment in terminating the practice. Some confusion did exist particularly with the trial court below. Notwithstanding the consistent finding by other Federal courts that verification by competitors of customers' claims of more favorable competitive offers does not violate the Sherman Act when done for the purpose of complying with the Robinson-Patman Act or to protect against customer fraud,[3] the trial court below believed that the *Container* decision in 1969 had changed the law of *Cement Manufacturers*. It was the trial court's position that *Container* prohibited even good faith verification for Robinson-Patman purposes, at least, where such verification might have had a stabilizing effect on prices.

The trial court inaccurately instructed the jury that "defendants do not dispute the fact that they did exchange price and other competitive information among themselves and with each other and with others." (App. p. 170a). Not only did this instruction not differentiate among defendants, it also did not identify the periods for which various defendants acknowledged that they had verified. It left the jury with the mistaken judicial assertion that Petitioners Colon Brown

[3] *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); *Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Webster* v. *Sinclair Refining Co.*, 338 F.Supp. 248 (S.D.Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971).

and J. P. Nicely had made sweeping admissions of general price discussions with competitors. Both did and do dispute that they at any time exchanged price and other competitive information with competitors or that they either authorized or participated in the exchange of price and other competitive information by National's employees with employees of other gypsum producers. Moreover, there was no evidence within or before the statutory period proving otherwise.

The trial court's attention was called to the error of its instruction, but it did not correct the situation. (App. p. 171a). Thus the jury was allowed to measure the defendants' verification activities before *Container* and before the statutory period by an erroneous standard which the judge drew from *Container* and erroneously applied retroactively. That was a fatal error which the Court of Appeals for the Third Circuit did not correct.

But even if the trial court had been correct in its reading of *Container*, it would still have been error to permit the jury to consider good faith verification prior to *Container* as evidence of Sherman Act illegality.[4] Such a reading of *Container* would constitute a sharp departure from the previously established principles of *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925) and *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925). Retro-

[4] Both National and Andrew Watt submitted requests, which (under the procedures established for the multi-party trial) accrued to all defendants' benefit, for an instruction that, under the court's interpretation of *Container*, the jury could not consider pre-*Container* verification for Robinson-Patman purposes to be evidence of unlawful conduct. (National's Supp. Req. Regarding Retroactivity of Intervening Change of Law).

active application of such a changed rule of law would do violence to basic fairness and is prohibited under the Due Process clause.

Such unexpected judicial enlargement, by decisional interpretation or the expanded definition of a crime, if retroactively applied would be unconstitutional.[5] In *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-54 (1964), the Supreme Court approved the *prospective application only* of unanticipated judicial changes of law and compared such changes to *ex post facto* laws:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statute language. As the Court recognized in *Pierce* v. *United States*, 314 U.S. 306, 311, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' . . . Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art I, § 10, of the Constitution forbids . . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process clause from achieving precisely the same result by judicial construction."[6]

[5] Importantly, *Container* itself was filed as a civil injunction suit, *not* a criminal prosecution. This fact reinforces the inherent unfairness of retroactive application, in this criminal case, of the drastic change which the trial judge believed *Container* had effected in the antitrust laws.

[6] It might be suggested that the Sherman Act itself is so vague that it inadequately defines the elements of the crime with which defendants were charged. But, at least on the subject of verification, many years of decisional interpretation have made it clear that exchanges of information by competitors about prices which they had been charged or offered, for a lawful purpose such as the prevention of customer fraud, are not violative of the Act. If *Container* were to be read as changing this long line of cases interpreting the prohibition of the Sherman Act, then such a drastic judicial enlargement of the Sherman Act could not be applied retroactively without offending basic fairness and due process.

The *Bouie* principle has now been more completely delineated. (See, *e.g.*, *United States* v. *Insco*, 496 F.2d 204, 209 (5th Cir. 1974); *United States* v. *Palladino*, 490 F.2d 499, 500 (1st Cir. 1974). And this Court recently held that a criminal conviction could be upheld under Due Process only if the defendant had adequate notice of the standard to be applied to govern his conduct. *Stanley Marks* v. *United States*, 45 U.S.L.W. 4233 (1977). Furthermore, as Judge Hastie stated in *United States ex rel. Clark* v. *Anderson*, 502 F.2d 1080, 1083 (3d Cir. 1974); "Such speculative anticipation of a series of future judicial rulings is not the stuff out of which adequate notice can be fashioned."

Other Federal cases illustrate application of the non-retroactivity principle. For example, after *Miller* v. *California*, 413 U.S. 15 (1973), and related cases, changed the constitutional standards for regulation of obscenity on June 21, 1973, Federal appellate courts ruled that the *Miller* decision could not be applied retroactively. Rather, defendants indicted in obscenity cases for their conduct prior to the *Miller* decision were to be judged under the more favorable pre-*Miller* standards. And in *Hamling* v. *United States*, 418 U.S. 87 (1974), reaffirmed by this Court in *Stanley Marks*, *supra*, this Court held that in review of a pre-*Miller* conviction the defendant must be given benefit

of the more favorable of the pre-*Miller* and post-*Miller* standards.

Moreover, even where the lack of notice of a new rule of law does not rise to the level of a Due Process violation, the courts will nonetheless refuse to apply such a rule retroactively where unfairness will result. As the Supreme Court stated in *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973):

> "However appealing the logic of [the old rule of automatic retroactivity] may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity."

Certainly, where persons have acted in reliance on the teachings of *Cement Mfrs.* and similar decisions and on the advice of their counsel based on these decisions, it would shock the conscience to hold that such conduct occurring prior to a judicial enlargement of the law could be the basis for criminal convictions.

Under the trial court's unique and unsupported reading of *Container*, it was error to refuse to give the requested non-retroactivity instruction. This refusal especially prejudiced Petitioners Brown and Nicely, who had no connection with and only an incomplete comprehension of the practice of verification.

While the Court of Appeals conceded that this issue of verification was the central issue in the case and based its reversal on the trial court's error in not considering the purpose of verification, the Court of Appeals appears also to give retroactive effect to *Container*, and thus focuses not on the compelling lack of evidence to support a conviction of these Petitioners but on the extent to which the practice of pre-*Container* verification is permitted under the Supreme Court's decision. (Appendix p. 14a, *et seq.*). This too deserves the attention of this Court.

In its effort to judge occasional verification in light of the *Container* decision as well as several other decisions which were handed down after National Gypsum stopped verifying, the Third Circuit established a new rule by which Petitioners' alleged conduct was to be judged. *Cement Mfrs.* stood for the proposition that to prevent against buyer fraud the exchange of information was permissible. However, to permit *Container* to "retain more vigor" to distinguish the "gasoline war" case with which the Court disagreed (decided long after National ceased verification), and to align the Third Circuit's decision in *Viviano Macaroni Co.* v. *F.T.C.*, 411 F.2d 255 (3rd Cir. 1969) with *Kroger Co.* v. *Federal Trade Commission*, 438 F.2d 1372 (6th Cir. 1971), *cert. denied*, 404 U.S. 871 (1971) the Third Circuit judged Petitioners' conduct with the following *new* four-part test:

> "Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; (4) and their communication with competitors was strictly limited to the one price and one buyer issue." (App. p. 26a).

This four-part test effectively purports to change at the expense of these Petitioners the existing law which required no such detailed finding. Such an unanticipated judicial change of an established rule of law if applied retroactively violates the Due Process Clause and deserves the attention of the Court.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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May 9, 1977

Appendix

550 F.2d 115 (3d Cir. 1977)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1836/75-1842

UNITED STATES OF AMERICA

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, GEORGIA-PACIFIC CORPORATION, KAISER GYPSUM COMPANY, INC., THE CELOTEX CORPORATION, THE FLINTKOTE COMPANY, GRAHAM J. MORGAN, ANDREW J. WATT, COLON BROWN, J. P. NICELY, WILLIAM H. HUNT, CLAUDE E. HARPER, ROBERT A. COSTA, WILLIAM D. HERBERT, GEORGE J. PECARO, JAMES D. MORAN

UNITED STATES GYPSUM COMPANY,
Appellant in No. 75-1836

NATIONAL GYPSUM COMPANY,
Appellant in No. 75-1837

GEORGIA-PACIFIC CORPORATION,
Appellant in No. 75-1838

THE CELOTEX CORPORATION,
Appellant in No. 75-1839

COLON BROWN,
Appellant in No. 75-1840

JAY P. NICELY,
Appellant in No. 75-1841

ANDREW J. WATT,
Appellant in No. 75-1842

(D.C. Criminal No. 73-347)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, HUNTER and WEIS, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 15, 1975, be, and the same are hereby reversed and the cause remanded in accordance with the opinion of this Court.

ATTEST:

/s/ THOMAS QUINN
Thomas Quinn
Clerk

January 6, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(Caption Omitted in Printing)

(FILED JANUARY 6, 1977)

HUNTER, *Circuit Judge:*

This is an appeal by United States Gypsum Company (USG), National Gypsum Company (National), Georgia-Pacific Corporation (G-P), The Celotex Corporation (Celotex), Andrew J. Watt, Colon Brown, and J. P. Nicely, defendants in a complex case under Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Each corporate defendant manufacturers, sells, and distributes gypsum board products, which are widely used in the construction industry. Watt is Executive Vice President of USG. Brown is Chairman of National's Board of Directors, and Nicely recently retired as Vice President for Sales in National's Building Products Division.[2] For the reasons that follow, we reverse and remand.

I

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[1] Section 1 reads in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

[2] Each of the corporate defendants received the maximum $50,000 fine. Brown also drew a $50,000 fine, as well as a six-month suspended sentence and three years probation. Watt received a $10,000 fine, a six-month suspended sentence, and one year probation. Nicely was fined $1,000 and received a six-month suspended sentence and one year probation. After the indictment in this case was handed up, § 1 was amended to provide for a maximum fine of $1,000,000 for corporate defendants and $100,000 for other persons. 15 U.S.C. § 1 (1970), *as amended*, (Supp. IV, 1974).

I.

Gypsum board is produced in standard sizes, of which 4′ x 8′ x ½″ is the most common. It consists of a layer of gypsum rock sandwiched between sheets of heavy paper. Since World War II, it has replaced gypsum plaster as the principal component of interior walls in all types of buildings.

The gypsum board industry is highly concentrated. Between 1960 and 1973, the number of producers varied from nine to fourteen, and the eight major producers accounted for more than ninety-four percent of national sales. The corporate appellants together account for more than seventy-five percent of national sales. There are no significant differences in quality or appearance among the standard types of board produced by the various manufacturers. Demand is determined by activity in the construction industry and is inelastic with respect to price. Because of the homogeneity of the different brands, a buyer's decision to purchase one particular brand is generally based on price. Price discounts and changes in credit terms are the most important form of competition in the industry.

Between 1965 and 1970, the Department of Justice conducted several investigations of possible antitrust violations in the gypsum board industry. In 1971, a grand jury inquiry commenced, and another twenty-eight months of investigation ensued. On December 27, 1973, an indictment was returned in the Western District of Pennsylvania. It named the appellants and nine other defendants [3] as partici-

[3] The other defendants were Graham J. Morgan, chairman of the board of USG; William H. Hunt, president of G-P; William D. Herbert, president of Celotex; Kaiser Gypsum Company; Claude E. Harper and Robert A. Costa, Kaiser's president and vice-president, respectively; The Flintkote Company; and George J. Pecaro and James D. Moran, Flintkote's chairman of the board and president, respectively. The indictment named as co-conspirators, but not as defendants, Johns-Manville Corporation; Fibreboard Corporation; and the Gypsum Association, the industry trade association.

pants in a conspiracy, starting before 1960 and lasting to the date of indictment, (1) to raise, fix, maintain, and stabilize the price of gypsum board; (2) to fix, maintain, and stabilize the terms and conditions of sale of gypsum board; and (3) to adopt and maintain uniform methods of packaging and handling, all in violation of Section 1 of the Sherman Act.

All defendants moved for dismissal, alleging that unreasonable pre-indictment delay had worked a denial of their rights to due process of law as guaranteed by the fifth amendment to the United States Constitution. This motion was denied after a five-day evidentiary hearing. Subsequently, the nine defendants who are not parties to this appeal were convicted and sentenced on pleas of nolo contendere.[4] Trial of the remaining defendants began on March 3, 1975, and the jury brought in its verdict on July 15, 1975. The Government called thirty-five witnesses, appellants thirty. The trial record consists of more than 15,000 pages of transcript and some 6500 exhibits.

II.

At the outset, we are met with appellants' contention that the due process clause of the fifth amendment requires dismissal of the indictment. They allege that the Government unduly delayed bringing the indictment and that this delay impaired appellants' ability to present a defense. We affirm the district court's refusal to dismiss the indictment.

[4] Kaiser and Flintkote each received the maximum $50,000 fine. Morgan (USG) received a $40,000 fine, a six-month suspended sentence and two years probation. Hunt (G-P) and Harper (Kaiser) each drew a $40,000 fine, a six-month suspended sentence, and eighteen months probation. Herbert (Celotex), Costa (Kaiser), Pecaro (Flintkote), and Moran (Flintkote) each received a $20,000 fine, a thirty-day suspended sentence, and one year probation.

In *United States* v. *Marion*, 404 U.S. 307 (1971), the Supreme Court indicated that "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellants' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324. Because no prejudice was shown, however, the *Marion* Court upheld the indictment. Thus, there was no holding as to the specific requirements of a successful showing of prejudicial delay, and it was unclear whether both prejudice and governmental intent are necessary or whether prejudice alone would suffice. *See, e.g., United States* v. *Barket*, 530 F.2d 189, 194-195 & n.9 (8th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3518 (U.S. March 16, 1976). We need not resolve this question, because we find neither undue delay nor substantial prejudice.

We consider first the alleged undue delay. Appellants' major argument is that the Government deliberately postponed empaneling the grand jury to await the outcome of a civil case, *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), involving charges of the same conspiracy. After a lengthy evidentiary hearing, however, the court below found that the interval between the initial investigations of the gypsum board industry and the bringing of the indictment was not unreasonable in light of the extraordinary magnitude of the case and the frequent dead ends encountered by the investigators. *United States* v. *United States Gypsum Co.*, 383 F.Supp. 462, 464-70 (W.D. Pa. 1974). As the district court noted, *id.* at 467, any delay in empaneling the grand jury resulted from the Government's reluctance to frame criminal charges against appellants before learning whether plaintiffs in a civil action could carry their burden of proof. The district court's findings are not clearly erroneous.

USG separately argues that the Government is collaterally estopped to deny intentional delay, relying on *United States* v. *United States Gypsum Co.*, Civil No. 71-2467 (N.D. Cal., filed Dec. 30, 1971). In that suit against six gypsum companies, the Government sought to recover damages accrued before the start of the normal four-year period, claiming that defendants' fraudulent concealment of their conspiracy had tolled the statute of limitations. The district court granted a motion for partial summary judgment, declaring that the Government did know, or should have known, of the alleged conspiracy prior to January 1, 1968. This finding, insists USG, estops the Government from denying delay in this case.

In *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d 840, 844 (3d Cir. 1974), Judge Garth noted three requirements that must be satisfied before collateral estoppel will apply:

a) The issue decided in the prior litigation must be identical with the issue presented in the action in question;

b) The prior litigation must have resulted in a final judgents [sic] on the merits; and

c) The party against whom the estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication.

USG's claim does not satisfy the first requirement. Governmental knowledge sufficient to preclude reliance on the doctrine of fraudulent concealment in a *civil* case is not identical with the availability of evidence sufficient to support the decision to bring *criminal* charges against the same defendants. Proof of the existence of the former does not entail proof of the existence of the latter. Therefore, there can be no collateral estoppel.

Having found no undue delay, we note that, in any event, appellants have not met their burden of proving substan-

tial prejudice. In *United States* v. *Dukow*, 453 F.2d 1328 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972), this court, following *Marion*, refused to order the dismissal of an indictment where no substantial prejudice was shown. *Accord*, *United States* v. *Benson*, 487 F.2d 978, 984-85 (3d Cir. 1973). In *Dukow*, Judge Adams held the deaths of two potential witnesses not prejudicial, because there had been neither an offer of the testimony they would have given nor any indication that they possessed unique knowledge of the transaction in question. *Dukow*, *supra*, 453 F.2d at 1330. Here, as in *Dukow*, appellants argue that potential witnesses died in the lengthy interval between initial investigation and trial, but there is no showing that the deceased would have proffered testimony not merely cumulative of the evidence already at appellants' disposal.

Of the thirty-six deceased potential witnesses listed, only three received particular attention from appellants. One was Melvin Quayle, who was depicted in other testimony as an emissary of the other alleged conspirators. Quayle's denial before the grand jury of this role was read at trial. Appellants do not suggest that he would have testified any differently had he lived.

Appellants also insist that Donald Miller, late merchandising manager of Celotex, "would have made an excellent witness for the defense." They vouchsafe no reason to believe, however, that Miller's testimony would have been significantly more exculpatory than that offered by other witnesses.

Finally, appellants single out a USG memorandum of June 6, 1961, as a document the Government was able to exploit because its author, B.J. Nabors, was dead. Appellants, though, were free to offer alternative explanations of the document's contents. Moreover, Nabors died in 1967, ten months before the date on which USG claims the Government should have known of the conspiracy and sought

an indictment. Cases of this magnitude often last so long that documents are introduced when the authors are no longer available to dispel any inculpatory impressions the documents may create. To hold that this handicap, by itself, is a violation of due process would be to erect a practical barrier to suits of this sort.

Appellants argue that under *United States* v. *Barket*, *supra*, the Government bears the burden of proving that none of the unavailable witnesses possessed exculpatory evidence. We find this argument unpersuasive. *Barket* differs from the case *sub judice* in several important respects. First, the procedural posture of *Barket* was the reverse of that here: the district court had granted the motion to dismiss the indictment. Second, the *Barket* court expressed grave misgivings about the merits of the Government's case. Third, the Eighth Circuit found the Government guilty of culpable negligence in delaying Barket's indictment. Fourth, and most important, the *Barket* court explicitly found that "Barket's ability to defend himself on the crucial issue" had "undoubtedly" been impaired. *Id.* at 193.

None of these conditions obtains in the case before us. Because the court refused to dismiss the indictment, we can order it dismissed only if we hold the district court's findings clearly erroneous. We are unable to take the frankly skeptical view of the Government's case on the merits. adopted by the *Barket* court. As we have already noted, the Government did not cause any undue delay in this case. Most importantly, we do not find that appellants' ability to defend themselves was impaired. Because the *Barket* court explicitly reached the opposite conclusion, its statement concerning the burden of proof on the issue of missing witnesses' possession of exculpatory evidence was dictum.[5] And were the statement indeed necessary to

[5] In concluding that the Government bears the burden of proving that no unavailable witness would have offered significant,

the result in *Barket*, we would see no reason to depart from the clear teaching of *Dukow* and impose upon the Government the burden of proving that none of the unavailable witnesses possessed significant, exculpatory evidence. *See, e.g., United States* v. *McGough*, 510 F.2d 589, 604 (5th Cir. 1975).

III.

Thorough scrutiny of the voluminous record and careful consideration of the many issues raised on appeal convinces us that reversal is required.

A.

The Government's case on price fixing centered on a practice appellants call "verification." An officer of one gypsum board manufacturer would telephone a competing

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exculpatory evidence, the *Barket* court relied on United States v. Norton, 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). Norton, however, involved an unusual situation. The Government intentionally delayed its arrest of Norton on drug charges so that its informant, a key witness, could remain undercover and gather evidence for other prosecutions. Before Norton's arrest, the informant was murdered. The Eighth Circuit held that the Government had to accept the risk that its conscious decision to delay Norton's prosecution might result in the unavailability of a witness necessary to guarantee Norton a fair trial. Therefore, the burden of showing the informant's lack of exculpatory evidence was placed on the Government. Norton, however, was held to have waived the right to argue that the delay had prejudiced his defense, because he had rejected the Government's offer of proof on the issue of the informant's probable testimony. *Id.* at 453.

Whatever the merits of the *Norton* holding in the context of informant cases, we do not believe that it should be extended beyond that special context. An informant in a drug case is a potential witness who may be presumed to possess unique knowledge about the transaction. Rovario v. United States, 353 U.S. 53, 64 (1957). No such special presumption attaches to the usual witnesses in other cases. *See* United States v. Dukow, 453 F.2d 1328, 1330 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972).

firm's officer to determine the price at which the competitor was offering gypsum board to a specific customer. The scope, purpose, and duration of this activity are sharply disputed by the parties. The Government contends that the purpose of verification was to enable competitors to stabilize prices and "police" agreed-upon increases, that the calls involved broad discussions of present and future pricing policies, that the appellants verified daily, and that they continued to do so until 1973. Appellants insist that the only purpose of the calls was to ensure compliance with the Robinson-Patman Act (discussed below), that the conversations were limited in scope and number, and that the practice had been discontinued, except for a few isolated, unauthorized calls, before the start of the applicable limitations period, December 27, 1968. There is evidence to support each claim of both sides.

Appellants contend, however, that the court below erred in instructing the jury on the legal status of the practice. Although appellants assert that the evidence demonstrated that the purpose of certification was to comply with the Robinson-Patman Act, the trial court instructed the jury that any purpose was irrelevant so long as the jury found that verification had a stabilizing effect on prices.[6] The

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[6] On this point, the court charged as follows:

> Secondly, you must determine whether the purpose for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.
>
> If you decide that, if you decide this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.
>
> However, ***if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices.*** (Emphasis added).

refusal to instruct the jury about the relevance of purpose was, for the following reasons, reversible error.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a),[7] prohibits sellers from discriminating in price between different purchasers of the same commodity. Section 2(b), 15 U.S.C. § 13(b),[8] permits a seller to rebut a prima facie case under 2(a) by "showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." The Supreme Court has held that Section 2(b) places

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[7] Section 2(a) reads in pertinent part as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

[8] Section 2(b) reads as follows:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that this lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

> on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

Federal Trade Commission v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945). This court declared in *Viviano Macaroni Co.* v. *Federal Trade Commission*, 411 F.2d 255, 259-60 (3d Cir. 1969), that the seller cannot meet this burden merely by accepting the purchaser's word with respect to competitor's offers; instead the seller must attempt to corroborate the report, as well as the reliability of the purchaser or other reporter.

Appellants claim that their verification practice was designed to comply with the dictates of *Staley* and *Viviano*. They assert that almost all discounting off list prices was not reflected in invoices, rendering that form of corroboration ineffective. In addition, they say, purchasers of the gypsum board were notoriously unreliable and often were discovered to have lied about a competitor's offer in order to "whipsaw" a price cut. There is evidence to support these assertions. Therefore, argue appellants, they had three choices: (1) offer the reduced price on the basis of the purchaser's unconfirmed report and risk Robinson-Patman liability; (2) forego the price cut and risk losing the sale; or (3) call the competitor, verify his offer, and establish a section 2(b) defense to any Robinson-Patman charge concerning the price cut.

The countervailing policies of section 1 of the Sherman Act, however, complicate appellants' exposition of the issue. The Supreme Court has dealt several times with the limits imposed by the Sherman Act on exchanges of information among competitors. In *American Column &*

Lumber Co. v. *United States*, 257 U.S. 377 (1921), the Court held that section 1 of the Sharman Act condemned the exchange of specific price information with regard to specific customers, where the clear purpose was to stabilize prices. The Court reached the same result in *United States* v. *American Linseed Oil Co.*, 262 U.S. 371 (1923). Then in 1925, two cases upheld the exchange of information among competitors. In *Maple Flooring Ass'n* v. *United States*, 268 U.S. 563 (1925), the Sherman Act was held to permit the exchange of average cost data relating only to closed transactions, despite an apparent stabilizing effect on price, where no intent to constrain individual competitive activity was found. And the Court in *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U.S. 588 approved the exchange of specific price information concerning specific customers, despite possible effects on prices, where the purpose of the dissemination scheme was to prevent buyers from defrauding sellers.

The Supreme Court has drawn a narrow line in deciding the data dissemination cases under section 1 of the Sherman Act. The difficulty derives from the fact that in competitive markets, information exchanges promote competition, while in oligopolistic markets, they depress competition. *United States* v. *Container Corp. of America*, 393 U.S. 333, 342-43 (1969) (Marshall, J., dissenting); P. AREEDA, ANTITRUST ANALYSIS 13-16 (1974). Thus, the Court has attempted to fashion rules that will reach the latter, yet not amount to broad proscriptions embracing the former.

In *Container, supra,*—the most recent data dissemination case—the facts were similar to those presented in the case *sub judice*. Eighteen manufacturers of corrugated containers accounted for 90% of the shipments of such products from the southeastern United States. The industry exhibited excess capacity and a downward trend in prices, yet twenty-one new competitors entered the industry during the period covered by the complaint—a clear indication

that prices were above competitive levels. Containers were produced to customer specifications, but were substantially identical regardless of manufacturer. With a few exceptions, no manufacturer could command a higher price than another. From 1955 to 1963, defendants exchanged with varying frequency the prices most recently quoted to specific customers. No Robinson-Patman defense was raised, however.

The Supreme Court, 6-3, found a combination or conspiracy proscribed by the Sherman Act. The freedom to supply information only if each defendant so chose was described merely as the freedom to withdraw from the agreement. From the concentrated nature of the industry, the majority concluded that the information exchanges must have set a floor under prices. The Court distinguished *Cement Manufacturers, supra,* by pointing out that *Container* revealed no "controlling circumstance, *viz.*, that cement manufacturers . . . exchanged price information as a means of protecting their legal rights from fraudulent inducements . . . ." *Id.* at 335.

Mr. Justice Fortas concurred, declaring that he did not understand the majority to have established a *per se* ban of such exchanges. Instead, he concluded that the record supported a finding that the data dissemination had in fact affected prices. *Id.* at 338-40 (Fortas, J., concurring). Justice Marshall, joined by Justices Harlan and Stewart, dissented. He agreed that exchanges of price information were not illegal *per se*, but he disagreed with Justice Fortas' conclusion that the record showed any effect on prices. *Id.* at 340-47 (Marshall, J., dissenting).

Each of the *Container* opinions found an agreement in the reciprocal dissemination of price information. The discord arose over proof of the agreement's effect. None of the Justices concerned himself with the agreement's purpose. The Court's careful distinction of *Cement Manu-*

facturers, however, suggests that proof of an actual purpose is not irrelevant in all cases. Where the information exchange occurs under a "controlling circumstance," such as the purpose of preventing fraud in *Cement Manufacturers*, the exchange can be upheld under the Sherman Act, despite a proven or presumed effect on price.[9]

The question before us is whether appellants' alleged desire to establish a defense, to price discrimination

[9] If purpose were always irrelevant, as Judge Weiss's dissent declares, then the *Container* Court would effectively have overruled *Cement Manufacturers*. *See The Supreme Court*, 1968 Term, 83 Harv. L. Rev. 7, 234-5 (1960). Yet the vitality of *Cement Manufacturers* has been reaffirmed by favorable citation in Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 781, *reh. denied*, 423 U.S. 886 (1975), and United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113 (1975). Those cases also cite Justice Fortas's *Container* concurrence, suggesting that *Container* did not establish a *per se* rule aaginst information exchanges, but left some to qualify as legitimate under the Sherman Act.

Judge Weiss's dissenting opinion also attempts to liken the factual setting in the case *sub judice* to that found violative of the Sherman Act in *Container*. The dissent notes that the district court in *Container* found that buyers "on occasion" furnished inaccurate information as to competing sellers' prices, *see* United States v. Container Corp. of America, 273 F. Supp. 18, 28 (M.D. N.C. 1967), and held that the desire to prevent fraud took the container manufacturers outside the Sherman Act ban.

All this is irrelevant to the case at hand. Here, fraud is not at issue. Indeed, the *Container* opinion makes it clear that mere bad faith bargaining does not amount to "fraud" in the *Cement Manufacturers* sense.

What appellants urge here, though, is not a desire simply to avert occasional bad faith bargaining, but to comply with the positive duties imposed by another statute, the Robinson-Patman Act. The Robinson-Patman defense was not raised by the *Container* defendants at trial and was argued to the Supreme Court merely as an afterthought. That Court did not deal with it.

The question before us, then, is not whether occasional, or even widespread, buyer prevarication justifies price information exchanges, but whether the commands of Robinson-Patman may sometimes do so, when accommodated to Sherman Act strictures.

charges, of compliance with section 2(b) of the Robinson-Patman Act would create a similar "controlling circumstance" that would legitimate an agreement otherwise prohibited by section 1 of the Sherman Act. If it would, then the trial court's instruction was improper in permitting the jury to convict appellants merely by finding an effect on prices, with no consideration of purpose. The Government denies that compliance with section 2(b) amounts to a "controlling circumstance." *Container*, claims the Government, limited "controlling circumstances" to prevention of fraud.

We do not read that case so narrowly. If the *Container* Court had sought to restrict the exception to "prevention of fraud," it could have distinguished *Cement Manufacturers* by noting simply that the *Container* case did not involve an attempt to thwart fraudulent purchasing practices, as had *Cement Manufacturers*. Instead, the Court used that much broader term "controlling circumstance," one of which was the desire to prevent fraud present in the latter case. This suggests that there are "controlling circumstances" other than the one delineated in *Cement Manufacturers*.

Price verification, insist appellants, must be considered a controlling circumstance. They claim that otherwise the very activity dictated by the Robinson-Patman Act could be used as evidence of conspiracy to convict under the Sherman Act. This conflict between the two acts would leave them with their three unappealing alternatives: (1) forego the price cut and probably lose a sale; (2) cut the price and risk a Robinson-Patman charge, if the buyer was lying; or (3) verify the price and risk the Sherman Act charge involved here.

The Government replies that nothing in the Robinson-Patman Act condones discussions about prices among competitors, nor has any court ever required such discus-

sions as a condition of establishing a section 2(b) defense. Section 2(b), says the Government, does not force appellants to verify. The Government poses its alternatives for the appellants: (1) refrain from cutting prices to the single buyer; (2) cut prices as to all buyers. In neither event will the seller break either antitrust law.

Even the Government concedes that this choice is "difficult." We fear that so limiting sellers' alternatives would discourage price competition in industries like gypsum board, where the fact that price cutting occurs off list prices and invoices makes corroboration of reported competitor's offers difficult or impossible. In such industries, the Government's alternatives would eliminate the section 2(b) defense. This, it seems to us, would be more likely to put a floor under prices than to induce wholesale cutting, since a firm in a concentrated industry would be unlikely to reduce prices across the board simply to close a single sale. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 181 (1955). And it is through isolated price reductions that established price levels are eroded, precipitating widespread price cuts. P. AREEDA, *supra,* at 231. The Government's position, then, could induce greater price rigidity.

Because the Government's resolution of the conflict between the Sherman and Robinson-Patman Acts would require us to read the Sherman Act as discouraging the very price competition it was designed to promote, we reject that resolution. Appellants, however, seek an accommodation of the two acts that would recognize any bona fide attempt to comply with section 2(b) of Robinson-Patman as a "controlling circumstance" for Sherman Act purposes. Anti-competitive dangers exist on this side, too. Such a resolution would countenance a broad range of data dissemination schemes and communications among competitors, which might provide camouflage for illegitimate

agreements. With this problem in mind, we turn to the cases that have already addressed this issue.

Except for the court below, each court to consider the issue has agreed with appellants that the attempt to establish a 2(b) defense amounts to a "controlling circumstance" that shields those exchanging information from Sherman Act liability. The first and most apposite case involved a civil action alleging essentially the same conspiracy charged here. In *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), the court found that manufacturers of gypsum board, because their products were homogeneous, deemed it essential to meet lower offers by competitors. Purchasers aggressively played one manufacturer against another, whipsawing a series of price cuts through the industry by falsely reporting lower offers. When purchasers told sellers' field representatives of competitors' lower offers, the representatives asked for invoices or other written corroboration, but these requests usually proved fruitless. In order to insulate themselves against possible Robinson-Patman liability, specific company officials were given authority to communicate with the competitor in question. This communication took place "only after exhausting other means of confirming the truth of such reported deviation." *Id.* at 309. Specific confirmation was obtained, and no reported offers were met unless verified. The *Wall Products* court held that this activity amounted to a "controlling circumstance" contemplated by *Container*. 326 F. Supp.

The three other cases that involved this issue shared similar facts. In each, a major oil company conferred with its competitors during a gasoline price war, in order to verify its competitors' prices before granting temporary allowances to its own local retailer. Although its is not made clear in *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S.D. Ala. 1971), whether the defendant communicated directly with competitors or merely observed

publicly posted prices, the court must have thought that there was direct communication. It stated that obtaining information from competitors does not violate section 1 of the Sherman Act if the "controlling circumstance" of Robinson-Patman compliance is present, citing *Wall Products,* 338 F. Supp. 251-52.

In *Belliston* v. *Texaco, Inc.,* 455 F.2d 175 (10th Cir.), *cert. denied,* 408 U.S. 928 (1972), the competitors exchanged price information that was also publicly available through trade journals and financial dailies. *Id.* at 181. The court cited *Wall Products,* however, for the broad proposition that price information exchanges for the purpose of establishing a Robinson-Patman defense amount to a "controlling circumstance." *Id,* at 182.

The third gasoline war case was *Gray* v. *Shell Oil Co.,* 469 F.2d 742, 746-47 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973). There the court held that the jury had to decide whether the purpose of Shell's communications with its competitors was to comply with the Robinson-Patman Act. Because the jury had found that purpose, the court upheld a verdict of no liability, citing *Belliston, supra.*

First, it should be noted that the three gasoline war cases significantly expanded the *Wall Products* holding. None contained any suggestion that alternative means of corroboration, such as invoices or public trade papers, were unavailable, as they had been in *Wall Products.* Indeed, the *Belliston* court expressly found that they were available. None indicated that the gasoline retailers had achieved the same reputation for mendacity that the Wall Products court ascribed to wallboard buyers. The gasoline war cases, then, suggest that the category of price exchanges that qualify as "controlling circumstances" is quite broad. So free a license to exchange price information might undermine the *Container* holding.

Second, these cases diluted the pro-competitive strength of the Sherman Act in order to preserve the force of Robinson-Patman's requirement of solid corroboration. Yet *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953), suggests that when policies of the Sherman and Robinson-Patman Acts conflict, it is the Robinson-Patman Act that should give way. In *Automatic Canteen,* a buyer was charged with violating section 2(f) [10] of the Robinson-Patman Act, which forbids inducement of a discriminatory price. The question before the Court was which party—the FTC or the defendant—had the burden of producing evidence on the issue of the seller's costs, information that might demonstrate that the varying prices were not in fact discriminatory. The Court refused to place the burden of discovering the seller's costs upon the buyer because, among other things, "it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies," *id.* at 69, that is, section 1 of the Sherman Act.

We are therefore reluctant to embrace the accommodation fashioned by the gasoline war cases, which seems to eviscerate the Sherman Act for the benefit of Robinson-Patman. The best way to resolve the dilemma framed by appellants in this case, in the light of *Automatic Canteen,* would be to ease their burden under Robinson-Patman, instead of facilitating evasions of the Sherman Act's pro-competitive strictures as did the gasoline war cases. If Robinson-Patman is interpreted to permit a seller lacking other corroboration to cut his price without taking the ultimate corroborative step of verifying the purchaser's report with his competitor, then the Sherman Act and *Container* retain more vigor. We think *Wall Products, Vivi-*

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[10] Section 2(f), 15 U.S.C. § 13(f), reads as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

ano, and a recent case in the Sixth Circuit outline such a solution to appellants' alleged dilemma.

In *Kroger Co.* v. *Federal Trade Commission,* 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971), the Sixth Circuit affirmed an FTC finding that Kroger had induced a discrimination in price, in violation of section 2(f) of the Robinson-Patman Act. In soliciting bids for sale of private label milk to its chain of grocery stores, Kroger falsely told Beatrice Foods that it had received a bid twenty percent off list price from another dairy. The FTC found that Beatrice attempted to corroborate Kroger's report, but did not contact its competitor directly. *Beatrice Foods Co.,* 76 F.T.C. 719, 809-11 (1969). Relying on Kroger's false report, Beatrice cut its price to Kroger. Both Beatrice and Kroger were charged with violating the Robinson-Patman Act. The FTC, however, held that Beatrice had established the "good faith meeting competition" defense under section 2(b). Despite this finding that the price was not illegal as to the seller, Kroger was held to have induced a discriminatory price. The FTC declared that Beatrice could not be held liable for the discriminatory effect of the price, because it had no reason to disbelieve Kroger. The Sixth Circuit affirmed the ruling that Kroger could nevertheless be held to have known that the price it induced was in fact discriminatory. *Kroger, supra,* 438 F.2d.

The *Kroger* case, when combined with the *Wall Products* decision and our *Viviano* holding, offers a solution to the quandary in which appellants claim to find themselves. *Kroger* indicates that sellers can establish a section 2(b) defense without taking the ultimate corroborative step of communicating directly with their competitors. It accomplishes this by holding the purchaser to a high standard of good faith bargaining under section 2(f). Thus, as long as the seller has taken all other reasonable steps in an attempt to corroborate his purchaser's report of lower offers, he need not fear Robinson-Patman liability, provided that—

as in *Kroger*—he has no independent reason to doubt the purchaser's reliability.

Viviano, though, requires the seller to investigate that reliability. *Viviano, supra,* 411 F.2d at 259. This holding protects the integrity of the section 2(b) defense. If the seller could discriminate in price when he had good reason to believe that the buyer—even a buyer held to a high standard by *Kroger*—was lying about a competitor's supposedly lower offer, then the "good faith" requirement of section 2(b) would be rendered nugatory. Therefore, if previous experience or the investigation required by *Viviano* reveals that the purchaser cannot be trusted, as was the case in *Wall Products, supra,* 326 F.Supp. at 309, then, and only then, the seller may communicate with his competitor to test the buyer's veracity. The presence of this doubt as to the purchaser's truthfulness, combined with the seller's inability to corroborate the buyer's reports independently, creates the "controlling circumstance" that exempts price information exchanges from the Sherman Act ban, under *Container.* This is a narrow "controlling circumstance," not the broad one of the gasoline war cases.

There was some evidence of this narrow "controlling circumstance" in this case. Several witnesses testified that the purpose of the "verification" calls was to establish a Robinson-Patman defense and that their scope was confined by that purpose. There was also testimony concerning the unreliability of purchasers in the gypsum board market. Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue.

Trial court charged instead that if the jury found that verification had an effect on prices, they had to find guilt under the Sherman Act. Because this charge improperly ignored *Container's* exception for price information exchanges carried out under a "controlling circumstance," reversal is required.

B.

Appellants also contend that, on the state of the evidence, they were entitled to a more precise charge on the purpose and scope of the conspiracy any particular defendant was alleged to have joined. The Government insists that the trial court's charge on this point was sufficient and that appellants waived their objections in any event. I agree with appellants that the court's charge was deficient. Finding no waiver, I would order reversal on this point.[11]

Over a period of five months, the Government introduced masses of evidence concerning a multitude of seemingly unrelated events and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing conditions of gypsum wallboard. Most of this evidence dealt with actions prior to the start of the applicable limitations period. In these circumstances, it was necessary specifically to inform the jury that any particular defendant could be found guilty of conspiracy only if he understood that he had joined the single, overall agreement charged in the indictment; participation in any of the subsidiary events was not enough. *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938); *accord, United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied sub nom. Da Silva* v. *United States*, 416 U.S. 987 (separate appeal), *cert. denied sub nom. Purin* v. *United States*, 417 U.S. 930 (1974) (separate appeal). The great number of activities in evidence and the huge cast of characters in-

[11] Neither Judge Adams nor Judge Weis agrees with this view.

volved made it essential to impress upon the jury that each defendant could be found guilty of the conspiracy charged only if that overall design was within his reasonable contemplation when he engaged in any of the isolated activities. Specifically, the jury should have been asked to decide whether a given defendant, by engaging in one or more of the apparently isolated events, was associating himself with the overall agreement charged in the indictment. *United States* v. *Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *citing Peoni, supra*, 100 F.2d at 403. This the trial court did not do.

Trial court did—as did the trial court in *Borelli, supra*—repeatedly instruct the jury that each defendant could be found guilty only if he knowingly joined the conspiracy charged and that guilt was to be determined on an individual basis.[12] But this left the jury—like the jury in *Borelli*—

[12] Relevant portions of the charge are as follows:

> Now I want to charge you at this time that it is your duty to give separate consideration to the charges against each of the Defendants, whether they were a corporation or an individual. Each must be passed upon by you separately. You may find all the Defendants guilty. You may find all of the Defendants not guilty or you may find some guilty and some not guilty. This depends on the facts as you find them and the inferences which you deem appropriate to draw from those charges. . . .
>
> An individual's membership in a conspiracy must be established by evidence as to his own conduct, what he, himself, knowingly said or did. . . .
>
> Now, there has been an issue raised that, even if—and it is, of course, denied there ever was a conspiracy—but it is contended that, even if one did exist, the Defendants or certain of them ceased to participate in any conspiratorial activity prior to December 27, 1968, and, therefore, cannot be found guilty, because they were not members of any conspiracy within the Statute of Limitations. . . .
>
> Now, in any trial, such as this one, with several Defendants, there is danger that a Defendant will not be judged solely upon the evidence applicable to him. In this regard, you must consider the evidence as to each Defendant separately.
>
> You have two questions to determine: First, whether there was

free to find that a defendant automatically associated himself with the overall conspiracy charged merely by participating in one or a few of the acts alleged to be individual elements of the grand design. In this sense, the findings of guilt may have been "all-or-none": once an overall conspiracy was found as to some defendants, all of the defendants could have been connected to the conspiracy by their involvement in one of the minor agreements allegedly part of it. The court failed to emphasize that joining a subsidiary agreement would not constitute guilt unless it was done with the intent to join the overall conspiracy. This "all-or-none" basis for determining guilt is what bothered the *Borelli* and *Peoni* courts.

The *Borelli* court described the problem:

> The view that if the evidence warrants the finding that some defendants were parties to a single agree-

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a conspiracy to the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were knowing participants in it. This involves an examination of the evidence, separately, with respect to each Defendant.

Now, in this instance—in this case, two of the Defendants are represented by one attorney. You still must examine the evidence as to each of those independently and reach your conclusion based on that evidence independently. Each defendant has the right to have you consider the evidence from his point of view—that is, you are to consider whether or not the evidence shows him individually guilty or not, and, unless you are convinced beyond a reasonable doubt of the guilt of a Defendant, you must return a verdict of not guilty as to that individual. . . .

In addition, you would not be warranted in finding any individual Defendant guilty, unless you find beyond a reasonable doubt that, knowing of the existence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier."

Thus, the trial court never explicitly told the jury that participation in one of the allegedly conspiratorial subsidiary events was insufficient, without more, to support a verdict of guilty.

ment to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable over-simplification. Rinaldo's testimony thoroughly warranted the finding of an agreement among himself, Joe and Rosario Magavero beginning in 1950 and continuing through 1959. But it does not follow, for example, that his recital of two deliveries to Tantillo in March and July, 1951, on the instructions of Locascio in one instance, and of Rosario Mogavero in the other, would justify a finding that Tantillo had thereby made himself a part of whatever narcotics enterprises Locascio, the Mogaveros and their future partners might engage in for the rest of their lives, provided only that these were uninterrupted—a theorem that would lead to the inevitable but extraordinary conclusion that Tantillo's two purchases entered him into a "partnership in criminal purposes," United States v. Kissel, 218 U.S. 601, 608, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), with Castiglia, who supplied a source to and took deliveries from an altered core seven years later, and *vice versa*.

Borelli, supra, 336 F.2d at 384. Appellants here raise a similar concern. For example, it does not follow that appellant Brown's participation in the allegedly conspiratorial 1965 industry-wide price increase and 1966 change in credit terms—the only actions with which any evidence connected him—means that he associated himself with an overall conspiracy to stabilize prices beginning before 1960 and lasting until 1973. **Each of the other appellants was likewise connected by the evidence only to a few of the dozens of allegedly conspiratorial episodes that the Government sought to weave into one overriding agreement. Yet the jury was never told that participation in one episode, without more, was insufficient to prove association in the latter enterprise.**

In view of the ambiguity surrounding the scope of any agreement joined by each of the defendants, the trial court should have given the charge they requested on this point.[13] Conspiracy is "an elastic, sprawling and pervasive offense." *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Trial courts must take great pains to prevent the seine of a conspiracy charge from entangling a defendant only tangentially related to the agreement in question.

The Government's assertion that appellants waived any objection to the trial court's charge on this point is without merit. Defense counsel three times expressed their willingness to make a record by "particularizing" objections to each charge the trial court denied. On each occasion, the court observed that particular objections would consume too much time and that one blanket objection sufficed to make a record for all. Where the trial judge declares that he does not require further elucidation of the requests he has refused, there can be no waiver. See *Green* v. *Reading Co.*, 183 F.2d 716, 719 (3d Cir. 1950); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 842 (1969). Hence, the lack of a specific objection to the refusal to give this specific charge does not bar appellants from raising it as error on appeal.

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[13] The requested charge was as follows:

> Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, *it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant*. Each defendant is chargeable with the acts of his or his fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment *of the common agreement or understanding, if any, to which you may find him or it a party*.

(Emphasis added).

Contrary to the Government's claim, appellants submitted their requested charge in a timely manner. After telling counsel on June 27, 1975, what the substance of his charge would be, the trial judge invited written objections by July 2. On June 30, the court advanced that deadline one day, so that he could rule on the objections before closing arguments began. On July 1, appellants filed numerous objections and supplemental requests designed to meet the court's previous comments. Among them was the charge at issue here. Because of time constraints, the trial court did not then rule on the lengthy submissions. He indicated, however, that he would refer to them in formulating his charge.[14] Because the court acknowledged on the record that appellants had timely called his attention to the points they wanted charged, the Government's assertion of waiver must fail.

C.

Appellants also question the sufficiency of the trial court's charge with respect to withdrawal from the alleged conspiracy. Where a continuing conspiracy is proven, each defendant who by affirmative action has completely dissociated himself from the agreement before the start of the limitations period is entitled to acquittal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1911). This abandonment may be effected by communicating it "in a manner reasonably calculated to reach co-conspirators." *Borelli, supra*, 336 F.2d at 388. Proof of such communication need not

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[14] The trial court's comments were as follows:

> I will use them only for the purpose of my own guidance in my final charge, but they are just too late for me to pass on them as a supplemental request for charge, *as for guidance of counsel*. . . .

(Emphasis added).

The lateness the court mentions relates not to the submissions in general, but to the court's ability to rule on them *that day* so that counsel would be aware of the court's intent when making their closing arguments.

involve evidence that the defendant directly informed each co-conspirator of his intent to withdraw.

> The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might, of course, be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence.

Buhler v. *United States*, 33 F.2d 382, 384 (9th Cir. 1929); *accord, Marino* v. *United States*, 91 F.2d 691, 698 (9th Cir. 1937), *cert. denied sub nom. Gullo* v. *United States*, 302 U.S. 764 (1938). *See also United States* v. *Goldberg*, 401 F.2d 644, 648-49 (2d Cir. 1968) *cert. denied*, 393 U.S. 1099 (separate appeal), *cert. denied sub nom. Tannenbaum* v. *United States*, 394 U.S. 932 (1969) (separate appeal); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L.Rev. 920, 958 (1959).

Appellants introduced evidence of the resurgence of price competition, and other forms of competition, which could have convinced the jury that one or more of the defendants had abandoned any conspiracy to stabilize prices and other conditions before the start of the limitations period. They also requested a charge to the effect that active competition on price might amount to the "affirmative action" necessary to accomplish a withdrawal.[15] Trial

[15] The requested charge was as follows:

> Even if you find the existence of a conspiracy formed before December 27, 1968 and continuing thereafter you must acquit any defendant if it appears that he withdrew from such a conspiracy prior to the December 27, 1968 date. To withdraw from a conspiracy, a conspirator must take affirmative action. Resumption of competitive behavior, such as intensified price cutting or price wars, *could* constitute such affirmative action. If there is a reasonable doubt as to whether a defendant has withdrawn from the conspiracy charged, if any existed, prior to December 27, 1968, that defendant must be acquitted.

(Emphasis added).

This charge would not have told the jury "that merely the fact that somebody was in competition shows withdrawal from conspiracy," as the trial court feared; instead, it merely recognized appellants' right to have the jury apply their theory of withdrawal if the jury believed their evidence and drew the inferences they asked the jury to draw. While not a model charge on this point, it at least drew the court's attention to the improperly narrow scope of the charge actually given.

court's charge, however, negated this theory of withdrawal. The court charged as follows:

> In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. *To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*
>
> Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise.

(Emphasis added).

As the court explained the meaning of "withdraw," is comprised only affirmative notification—which connotes direct announcement—and disclosure to law enforcement author-

ities. Either might constitute withdrawal, but the court, by limiting withdrawal to these two, improperly excluded other possibilities, such as conduct inconsistent with the theory of continued adherence.

The court did permit appellants to argue their theory of withdrawal to the jury. That opportunity did not salvage appellants' rights, however, because the court in its subsequent charge told the jury that they could not consider appellants' theory. Reversal is, in my opinion, required on this point.[16]

IV.

The judgments of conviction will be reversed and the case remanded to the court below.

To The Clerk:

Please file the foregoing opinion.

James Hunter, III, *Circuit Judge*

[16] Neither Judge Adams nor Judge Weis agrees with this conclusion.

Adams, *Circuit Judge, concurring.*

While I concur in the reversal of the defendants' convictions, I am impelled to comment on one issue that Judge Hunter has not discussed. That issue is whether the trial judge, in effect, directed the jury to reach definitive verdicts of guilty or not guilty. A determination that the verdicts were so induced would, of course, reinforce the conclusion reached by Judge Hunter.

I.

After a nineteen week trial, the jury began its deliberations in the afternoon of Tuesday, July 8, 1975. On each of the next two days (Wednesday and Thursday), the jury deliberated from 9:00 a.m. until 10:00 p.m.

On Friday, July 11, the fourth day of sequestered deliberations, the trial court advised counsel that "[s]ome of the jurors aren't feeling well" and that "[s]ome are tired." The judge suggested a weekend cessation in the deliberations to reduce the "strain" on the jury, but the defense counsel objected. The district court then summoned the jury foreman who, in the presence of counsel, reported that some jurors were "crying" and that others were concerned about being "away from home for a long time."[1] However, the foreman also stated that the deliberations were "going as well as can be expected."[2] As a result of this report, the trial court decided that deliberations would terminate each day at 6:30 p.m. instead of 10:00 p.m.

On Saturday, July 12, the judge, in open court, ordered the jurors to continue their deliberations. He did so, using

[1] Transcript at 15,128.

[2] *Id.* at 15,135.

[3] *Id.* at 15,136.

a supplemental instruction previously approved by this Court in *United States* v. *Fioravanti*.[4]

Late on Sunday, the sixth day of deliberations, the jury notified the court that it could not reach a verdict. A note addressed to the judge declared: "We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to compassion for his fellow jurors."[5] In response to this note, the judge assembled the jury and, in the presence of counsel, again gave the *Fioravanti* charge. When the jury retired, the judge informed counsel that he would not quickly declare a mistrial after a nineteen week trial.

On Monday, July 14, the seventh day of deliberations, the court received another note from the jury. This message stated that the foreman wished to "discuss the condition of the jury" and to "seek further guidance" from the judge.[6] The trial judge informed counsel that he would confer privately with the foreman (with a court reporter

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[4] 412 F.2d 407 (3d Cir.), *cert. denied sub nom.*, Panaccione v. United States, 396 U.S. 837 (1969).

Basically, the *Fioravanti* charge outlines the responsibilities of each juror during deliberations, including the duties to re-examine one's one predilections and to deliberate with a view towards reaching a verdict, if possible. For the text of the recommended instruction, see 412 F.2d at 420.

In this Circuit at least, the *Fioravanti* charge supersedes a supplemental instruction approved in Allen v. United States, 164 U.S. 492 (1896). In essence, the *Allen* charge cautioned the minority within a jury to "see the error of its ways." 412 F.2d at 417. Caustically denominated as the "dynamite" charge (*see* Green v. United States, 309 F.2d 852, 853 (5th Cir. 1962)), the *Allen* instruction had been criticized by eminent scholars and jurists as having an inherently coercive influence on jury deliberations. Consequently, this Court suggested the more neutral statement of juror responsibilities embodied in the *Fioravanti* instruction.

[5] Docket entry 322, #24.

[6] Transcript at 15,164.

present) and would impound the transcript of the conference. He went on to say, however, that if the parties objected, the foreman's request for a meeting would be denied. When the parties did not object to the proposed conference, though defense counsel did express serious reservations,[7] the judge spoke with the foreman in a room adjacent to the court. The transcript of the discussions then was impounded, despite renewed and repeated requests for it.[8] Indeed, it was not until this Court ordered its disclosure, pursuant to a post-trial motion by defendants, that they learned what the transcript contained.[9]

During the meeting between the judge and the foreman, the foreman initially reported on the health of the jury. He represented that the jurors were "distraught" and "sick," with "at least eight of the jurors . . . taking some kind of pill."[10] The foreman next stated that "personality conflicts on the jury" had impeded their discussions, but that the jurors "have overcome those [conflicts]."[11] Finally, the foreman declared that, in his "opinion," the jury was deadlocked: "We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony."[12] When the trial judge inquired whether the "jury is hopelessly deadlocked and will never reach a verdict," the foreman responded in the affirmative.[13]

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[7] *Id.* at 15,165-71.

[8] *Id.* at 15,174-75.

[9] Order of the Court of Appeals for the Third Circuit, dated September 16, 1975.

[10] Conference Transcript at 2.

[11] *Id.* at 4.

[12] *Id.* at 4.

[13] *Id.* at 6.

At the end of the conference, the following critical exchange occurred:

> Mr. Russell [foreman]: * * * It is a situation I don't know how to help you get what you are after.
>
> The Court: Oh, I am not after anything.
>
> Mr. Russell: *You are after a verdict one way or the other.*
>
> The Court: *Which way it goes doesn't make any difference to me.*[14]

The trial judge then instructed the foreman to "tell [the jury] to keep deliberating and see if they can come to a verdict."[15]

Upon returning to the courtroom, the judge purported to summarize for counsel what had transpired during the conference. The judge first stated that because of what [the foreman] calls personality differences between some members of the jury . . . he does not feel that they are ever going to be able to get over this." Thereafter, the court advised counsel that some of the jurors were "not feeling well," but that the foreman really did not "know if they are sick or aren't sick." The judge then announced that he had relayed a message to the jurors "to continue their deliberations."

Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definitive verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should "see if [it] can come to a verdict." Thus, it does not appear that the report on

[14] *Id.* at 7. (emphasis added)

[15] *Id.* at 8.

the substance of the discussions between the court and the foreman was accurate or even substantially accurate.[16]

In any event, on the following morning, the eighth day of deliberations, the jury returned guilty verdicts against each of the defendants.

II.

Defendants contend that the trial court "coerced" a deadlocked jury into reaching its verdict. They maintain that the judge caused the jurors to deliberate at excessive lengths and despite illness and exhaustion. The defendants also argue that the repetition of even an approved supplemental charge inherently compelled a verdict. Finally, they assert that the district court impermissibly insisted upon a verdict, foreclosing the possibility of a hung jury. Since I believe that only the last claim—that the verdict was improperly induced—is valid, I shall confine my discussion to that proposition.

The factual linchpin of the defendants' contention that the court, in effect, "coerced" a verdict from the jury is the private conference between the foreman and the trial judge. There, as noted above, the foreman declared that he knew the court wanted a verdict "one way or the other." At that point, I believe, the trial judge possessed the affirmative obligation to make it clear to the foreman that the jury had the option of reaching no verdict, should juror unanimity prove impossible. Instead, by stating merely

[16] In his dissenting opinion, Judge Weis appears to emphasize the fact that, after the trial court's report to counsel, one of the defense lawyers "suggested that the appropriate point [for declaration of a mistrial] would be the following morning [Tuesday, July 15]. . . ." However, it is reasonable to assume that, had this attorney known of the extent of the jury deadlock or that the court had in no way dispelled the foreman's belief that the court wanted a definitive verdict "one way or the other," he would have demanded an immediate mistrial.

"which way it goes doesn't make any difference to me," there was effectively conveyed to the jury, through the medium of the foreman, the directive that only a verdict for the prosecution or a verdict for the defendants would be acceptable to the court. Such an admonition provides justification, in my view, for overturning the defendants' convictions.

Reversal on this ground would appear to be required by prior teachings of the Supreme Court as well as this Court. In a per curiam opinion in Jenkins v. United States,[17] the Supreme Court deemed as coercive a trial court's instruction to a jury that "You have got to reach a decision in this case." While the counterpart in the present case was more subtle in nature, it does not appear to differ materially from the instruction proscribed in *Jenkins*. Nor is it any less coercive.[18]

This Court previously has provided a cogent delineation of the relevant principles governing judge-jury relations during the deliberative period. In *Fioravanti*,[19] we made it very clear that jurors should not return a verdict unless they have reached complete unanimity concerning the guilt or innocence of a defendant.

Speaking for a unanimous panel, Judge Aldisert posited:

> So long as the unanimous verdict is required in criminal cases, there will always be *three* possible deci-

[17] 380 U.S. 445 (1965).

[18] *Jenkins* does differ somewhat from the case at bar, as there the defective charge was given only two hours after the inception of jury deliberations. However, the variance in timing between that case and ours would not appear to be significant. In both situations, the judge made it known to the jurors that he wanted a definitive verdict, a request that soon after was rewarded. In *Jenkins*, such a procedure was deemed to be reversible error.

[19] 412 F.2d 407.

> sions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) *no verdict* because of a lack of unanimity. The possibility of a hung jury is as much a part of our jury unanimity schema as are verdists of guilty or not guilty. * * * [I]t is a cardinal principle of the law that a *trial judge may not coerce a jury to the extent of demand that they return a verdict.*[20]

In our system of criminal justice, then, a jury need not, and may not, render a verdict if it is unable to attain agreement. To permit a trial judge to undermine a jury's prerogative of not returning a verdict would abrogate the protection that the right to a jury accords criminal defendants. Moreover, if jurors are encouraged to subscribe to verdicts to which they are not committed, merely to reach some definitive result upon judicial insistence, then the universal perception of jury verdicts as manifestations of reasoned agreement would have to be examined anew. Such reevaluation is unnecessary so long as we thwart efforts to preclude one bona fide outcome of jury deliberations—no verdict.

None of this is to suggest that jurors should not be encouraged to reach a verdict, if unanimity is at all possible, or that the discretion of trial judges over declarations of mistrial should be restricted. Yet where a trial judge, in effect, eliminated the possibility of no verdict through comments to the jury, the validity of verdicts rendered by that jury should be called into question.

In the present case, it is evident that the jury had the mistaken impression, for whatever reason, that it must reach a verdict of guilty or not guilty. Yet, that impression was in no way dissipated by the trial court in its confer-

[20] 412 F.2d at 416. (emphasis added)

ence with the foreman, or at any time thereafter.[21] Indeed, the court's language seems to have confirmed the impression that a verdict of guilty or not guilty was required. This is especially so because the critical dialogue between the trial judge and the foreman occurred immediately after the court learned that the jury was so "hopelessly deadlocked" that the case was "not going to be settled by any document, any remembrance of testimony." In effect, the trial judge at that point took from the jurors their prerogative to render no verdict, should it have appeared to them, as the colloquy with the foreman so indicates, that unanimity was not attainable. Such encroachment on jury authority, and the concomitant proscription of a possible "no verdict" outcome, requires reversal of the defendants' convictions.

In my judgment, the jury issue present here warrants reversal, and such a conclusion buttresses the result reached by Judge Hunter.

III.

Having decided that the defendants' convictions must be reversed because of the jury question, I will comment but briefly on the matters considered by Judge Hunter.

I concur in Parts I, II and IIIA of Judge Hunter's opinion. As to Part IIIA, I do so, recognizing that the

[21] While the district judge had assured counsel that he would give no instructions on the law during the conference, nor repeat the *Fioravanti* charge, in my view, the judge should have attempted to remedy the foreman's belief that only verdicts of guilty or acquittal were acceptable. If the judge felt constrained not to provide any legal instructions during the conference, because of the assurances afforded counsel, he could have summoned the jury and, in the presence of counsel, informed the jurors that no verdict was appropriate and, indeed, necessary should they be unable to reach unanimity. Here, however, the court failed to take any such steps.

exception to Sherman Act liability that the § 2(b) proviso of the Robinson-Patman Act creates is a narrow one. Sellers in prosecutions for verification activities face the difficult task of convincing the jury or the court, as the case may be, that such activities do not constitute price-fixing but reflect a "controlling circumstance" beyond their power (*e.g.*, the "lying buyer").[22]

With respect to the "conspiracy" and "withdrawal" issues,[23] it is questionable whether the charge of the trial judge constituted reversible error. This is particularly so given the length of the trial and the unusually complex legal questions present in this litigation. Within the context of the complete charge and of the trial as a whole, the instructions as to these two issues would appear to be adequate. Even so, as the case must be retried, the district court would do well to incorporate in its charge, on remand, the suggestions set forth by Judge Hunter.

[22] 393 U.S. 333, 335 (1969).

[23] See Parts IIIB and C of Judge Hunter's opinion.

WEIS, *Circuit Judge, dissenting.*

A.

The majority opinion discusses the conflict between the Sherman and Robinson-Patman Acts and the resulting dilemma that a business concern may face in steering between this Scylla and Charybdis of commerce. However, the course chartered by the majority to avoid these two hazards, while carefully considered, does not clear the shoals of *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969).

The trial judge charged the jurors that, standing alone, verification to comply with Robinson-Patman did not violate the Sherman Act; such activity, however, could be evidence of an illegal agreement despite a proper purpose if stabilization of prices resulted. The majority hold that this instruction was erroneous. They read *Container Corporation* to allow an exchange of information with competitors in oligopolistic markets where:

1. the motive of the seller is compliance with Robinson-Patman;
2. he doubts the truthfulness of a buyer's report that lower offers by competitors have been made; and
3. the seller is unable to obtain independent corroboration of the buyer's representation.

This combination of factors is characterized as a "controlling circumstance." In the interest of brevity, it may be termed the "lying buyer" defense.

There are serious difficulties with this interpretation when the facts of the *Container* case are examined. The pertinent details in the case are not elaborated in the Supreme Court's opinion but must be gleaned from the ex-

tensive findings and opinion of the district court.[1] The trial judge determined that:

1. buyers furnished inaccurate, incomplete or misleading information on prices;
2. no defendant furnished a competitor his most recent price, except in response to a specific request;
3. verification was requested only when buyers were suspected of furnishing inaccurate information;
4. there was no agreement to exchange price data;
5. the information was not disseminated to the public or to customers generally; and
6. there was no proof that the exchange of data had the effect of stabilizing prices.

The district court concluded that the defendant's conduct was designed to "prevent the perpetration of a fraud upon them," and thus was insulated by *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588 (1925). Although the district court did not discuss the Robinson-Patman issue, it was briefed by the parties on appeal to the Supreme Court.

The factual background of *Container* is strikingly similar to that of the case *sub judice*, except that these defendants do not deny the existence of an agreement to verify and the jury verdict establishes the fact of effect upon prices. These factors weigh the scales even more heavily on the side of the government. The buyers' behavior in the gypsum industry cannot be classified as a "controlling circumstance" exempting the agreement from the proscription of *Container* if in that case the Court condemned that very circumstance.

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[1] The case is reported at 273 F.Supp. 18 (M.D. N.C. 1967).

The defendants here have been found guilty of price fixing, and it is now well settled that such conduct is illegal even if the motives which inspire it are beneficient or altruistic, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In essence, the defendants contend that if price stabilization did occur as a result of their efforts to prepare a Robinson-Patman defense, then such an effect is only incidental and not prohibited. But Robinson-Patman does not mandate price verification with competitors in oligopolistic markets. Our opinion in *Viviano Macaroni Co.* v. *FTC*, 411 F.2d 255 (3d Cir. 1969), does not go so far but requires only a reasonable inqury into a buyer's veracity. That case does not compel an investigation which itself is illegal either because it results in price fixing or violates other provisions of law.

If the Robinson-Patman Act requires verification, even that which tends to stabilize prices, it is difficult to understand why the defendants' "purpose" to comply would be significant. Observance of a statutory requirement is legal whether or not the actor has knowledge of it. Thus, it may be seen that the defendants' use of "purpose" is to make it interchangeable with "motive." As *Socony Vacuum, supra*, makes clear, that factor does not absolve those responsible for the forbidden anti-competitive effect. *See Maple Flooring Manufacturers Assn.* v. *United States*, 268 U.S. 563, 577, 585 (1925).

I do not understand *Container* to expand the holding of *Cement Manufacturers*, but rather to confine it. The Supreme Court did not attempt to distinguish *Cement* in detail but there is a difference between that fact situation where a seller was bound by an existing contract to furnish material and that which obtains here where he is free to enter into a transaction or not as he chooses. *Container* was based on the premise that information exchanges in a restrictive market have the actual or theoretical effect of stabilizing prices and generally should not be tolerated,

393 U.S. at 337. In the oligopolistic setting, the control of price information by the seller reinforces his economic power in a manner inconsistent with the play of free market forces. This theory led the Supreme Court to reject the proposition that an exception should be made when the exchange of price information is a response to the "lying buyer," though obviously the opinion did not condone the purchaser's tactics.

I agree with the majority that *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), and *Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973), do not fit within *Container*. Moreover, in my view *Wall Products Co.* v. *National Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971), does not follow the Supreme Court's opinion.

The trial judge in the case *sub judice* obviously grasped the significance of *Container* when he charged:

> "[I]f . . . the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [ex]changes as evidence of the mutual agreement . . . to raise, fix . . . and stabilize list prices."

I believe that in the circumstances of this case, the instruction was correct, properly presented the issue to the jury,[2] and, hence, did not constitute reversible error.

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[2] In Handler, Antitrust: 1969, 55 CORNELL L. REV. 161, 176 (1970), Professor Handler writes: "A compact to exchange price information plainly should be unlawful without more if its *purpose or effect* was to stabilize prices." He observed that in *Container Corporation* defendants had stressed Robinson-Patman as well as fraudulent conduct of the buyers as a defense, but Justice Douglas, author of the majority opinion, "rejected these assertions out of hand."

In Kefauver, The Legality of Dissemination of Market Data by Trade Associations: What does *Container* Hold?, 57 CORNELL L. REV. 777, 788 (1972), the author states: "The majority in *Con-*

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The testimony in this case took more than four months and generated a transcript of many thousand pages. After all the evidence had been received, the trial judge's task was to instruct the jury on complex issues of law in the antitrust, conspiracy and general criminal fields. Such a charge must be phrased in language intelligible to a lay audience and, while conveying the substance of the law, must be sufficiently succinct that the jury is not overwhelmed. Too often we on the appellate courts scrutinize jury instructions for adherence to the esoteric standards expected of a law review article. We tend to forget that the charge should be as simple as possible and contain no more than the jury needs to apply law to facts in reaching a verdict.

Judge Hunter's opinion faults the trial judge for failing to give the instruction requested by the defendants which is set out in full at footnote 12. In essence, this point for charge required the jury to determine what kind of agreement or understanding existed as to each defendant. It went on to say that no defendant was to be held responsible for what another conspirator might have done beyond the common agreement or understanding. I assume that the refusal of the trial judge to charge in the precise

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tainer of course found an effect of price stabilization, but nothing in the opinion indicated that they had found a *purpose* on the part of defendants to achieve such an effect." "*Container* placed a new emphasis on the *effect* of competitors' exchange of market information." *Id.* at 791. Professor Handler noted that a contrary result would promote evasion. *Cf.* Eaton, The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act, 18 Antitrust Bull. 411, 427 (1973). ("There is however a great potential for abuse in any 'lying buyer' defense. Its applicability may therefore be somewhat limited.")

A deliberate scheme to fix prices is, of course, illegal, even if unsuccessful, and in such a case the "purpose" of the defendants would be relevant to establish intent.

verbiage requested is not at issue, *see James* v. *Continental Insurance Co.*, 424 F.2d 1064 (3d Cir. 1970). Rather, the error claimed is the omission of an instruction to the effect that a particular defendant could be found guilty of conspiracy only if he understood that he had joined the single overall agreement charged in the indictment. As I read it, the charge adequately set forth the spirit of the instruction that Judge Hunter desires. The portions of the charge noted in footnote 11 of his opinion demonstrate that the jury was told each defendant's membership in the conspiracy was to be evaluated on an individual basis.

Early in the charge, the trial judge reviewed the indictment which listed allegations of some thirteen manners and means used to implement the price-fixing conspiracy. He later said:

> "Before the jury may find that a defendant or any other person has become a member of a conspiracy, evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy. . . . [S]o, if a defendant or any other person, understanding the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he, therefore, becomes a knowing participant, a conspirator.
>
> • • •
>
> "If it appears beyond a reasonable doubt, from the evidence in the case, that the conspiracy alleged in the indictment was knowingly formed and that any Defendant knowingly became a member of the conspiracy, either at the inception of the plan or scheme or afterward, then the success or failure of the conspiracy

to accomplish the common purpose or object is immaterial.

• • •

"In considering whether there was a conspiracy, you should bear in mind that a conspiracy does not have to be completely formed at one place or at one time. It can be put together a little at a time and can be joined at different times or in different ways by each alleged conspirator.

• • •

"Now, there are two essential elements which must be proved in order to establish the offense of conspiracy as charged in this indictment:

"First, that the conspiracy described in the indictment was knowingly formed and was exciting at or about the time alleged; and,

"Second, that the Defendants *knowingly* became members of the *conspiracy as charged.*

"If the jury should find—you, the jury, should find, beyond a reasonable doubt, from the evidence in the case, that existence of the conspiracy charged in the indictment has been proved, then the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been *knowingly* a member of the conspiracy, regardless of whether such a person *knowingly became a member at its inception or the beginning of the conspiracy or afterward, during the continuance of the conspiracy.*

• • •

"You have two questions to determine: First, whether there was a conspiracy of the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were *knowing* participants in it. This

involves an examination of the evidence, separately, with respect to each Defendant.

• • •

"In addition, you would not be warranted in finding any individual Defendants guilty, unless you find beyond a reasonable doubt that, knowing of the existence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier." (Emphasis supplied) [3]

The jury was not left in doubt that it was to analyze the evidence of each defendant's participation and return a guilty verdict only if convinced of his participation in the price-fixing scheme charged in the indictment. Moreover, just as a challenged sentence or paragraph should be viewed in the context of the complete charge, so should the instructions be considered in the perspective of the trial as a whole. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). After able and vigorous defense counsel had spent many hours arguing their respective clients' innocence and emphasizing the evidentiary matters favorable to them, it is unrealistic to believe that the lack of a semantical refinement in a lengthy and otherwise adequate charge had any effect whatsoever on the verdict. In my view, the charge as given was not erroneous but, even assuming it were deficient to some extent, reversal would not be warranted.

C.

Similarly, I do not agree that the charge on withdrawal from the conspiracy constitutes grounds for reversal. Judge Hunter's view is that the instructions improperly

[3] These instructions were taken in large part from 1 E. DEVITT and C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Chapter 23, ANTITRUST-CONSPIRACY-CONTRACT IN RESTRAINT OF TRADE (2d ed. 1970).

excluded the possibility of proving withdrawal by evidence of conduct inconsistent with adherence. Moreover, Judge Hunter asserts that the trial judge told the jurors they could not consider the defendants' theory to that effect. But the charge clearly and accurately stated that withdrawal could be found from evidence showing a defendant "took some affirmative action to disavow or defeat the purpose of the conspiracy." The court also stated that a defendant must have notified other members of the conspiracy or made disclosure to law enforcement officials. The trial judge concluded this phase of the charge by saying:

> "Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise."

The phrase "some definite, decisive step" was taken from our opinion in *United States* v. *Chester*, 407 F.2d 53, 55 (3d Cir.), *cert. denied*, 394 U.S. 1020 (1969), and is a correct statement of the law.

If the defendants understood the charge as limiting the evidence of withdrawal to notification, it was counsel's duty to request a correction. After the charge, defense counsel stated to the court:

> "Your Honor in referring to the subject of determination of abandonment of conspiracy named only two precise alternatives and failed to point out that resumption of competitive behavior such as intensified price cutting or price wars could constitute such aggressive action as to terminate conspiracy.
>
> THE COURT: I purposely left that out, as I do not think it is a correct statement of the law."

This colloquy must be understood in light of the discussion which occurred before the charge. Defendants had submitted a request for charge that "resumption of competitive behavior, such as intensified price cutting or price wars, could constitute such affirmative action. . . ." At a conference held before the summations, the following dialogue took place:

> [DEFENSE COUNSEL]: "Your Honor, may I inquire that you would give the part which says 'Resumption of competitive behavior,' such as intensified price cutting, or . . .
>
> THE COURT: No, I will not give that. I think that's an improper statement of the law. I am not going to say that.
>
> Competitive behavior may or may not be inconsistent with a conspiracy to fix prices, and it is just as arguable that when prices are low there is a conspiracy to try to get them up and try to get some profits, as there is the other way.
>
> And, furthermore, there is a logical argument here that there are people that were not in the club—as Mr. Fricano put it—not in the conspiracy that caused intensified competition.
>
> So, I am not going to charge that. That's for the jury to determine.
>
> [DEFENSE COUNSEL]: Do I understand that Your Honor is going to charge that there has to be direct evidence of withdrawal?
>
> THE COURT: No, I didn't say that at all.
>
> [DEFENSE COUNSEL]: I mean the point that we are talking about would indicate evidence from which it seems to me the inference would be drawn of withdrawal.

THE COURT: You can argue that to the jury, but I am not going to tell the jury that merely the fact that somebody was in competition shows withdrawal from a conspiracy. I don't think that's good law.

[DEFENSE COUNSEL]: I just want to be sure that you are [sic] going to say there had to be direct evidence of withdrawal.

THE COURT: There are numerous points here that you gentlemen have asked for direct evidence. I am not going to charge that in any instance that there must be direct evidence. There can always be evidence by conduct from which you can imply something."

Thus, defense counsel were advised in advance that the court would make only a general statement of the law and would not adopt their application of the facts, although counsel would be free to argue their factual proposition to the jury. The defense did not object to the charge because it limited evidence of withdrawal to affirmative notification, but rather because the judge refused to weave in the defense interpretation of the evidence. However, the jurors were free to consider that the alleged competitive activity was a definite, decisive step indicating a complete disassociation from the unlawful enterprise. The verdict indicates they rejected that theory. I cannot justify a new trial on the basis of this asserted deficiency in the charge.

D.

The concurring opinion finds reversible error in the trial judge's comments to the jury foreman and in the failure to declare a mistrial because the jury was deadlocked. I am unable to agree.

In fairness to the trial judge, it must be emphasized that he spoke to the foreman only after receiving the unequivocal assent of the individual defendants and counsel, and

indeed at the latter's urging. Defense counsel voiced some misgivings when the judge advised that he would impound the transcript "for review by some other court if that should ever become necessary," but the judge then stated that he would convey to counsel the import of his conversation with the foreman insofar as it did not reflect the thinking of the jurors. Moreover, the judge was explicit in stating that the transcript would not be available to counsel except on appeal, and he would not meet with the foreman if that provision was unacceptable. This condition precedent could not have been misunderstood by counsel.

After the conference with the foreman ended, the judge met with the lawyers and relayed the substance of the jurors' comments. Defense counsel then moved for a mistrial:

> "[O]n the basis that it appears from what we know, from what Your Honor has told us, and our observations, that the jury is deadlocked and it appears unlikely that they would be able to reach a unanimous verdict, apparently even with respect to the individual Defendant parties, and therefore there is the danger of the coerced verdict."[4]

The trial judge did not deny the motion, but deferred ruling, saying: "I am not going to discharge the jury yet . . . . I would like a view as to how much longer I should let them deliberate before I . . . declare a mistrial . . . ." One defense lawyer suggested that the appropriate point would be the following morning but another disagreed, stating that the deliberations had gone far enough.

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[4] In view of the tenor of the motion, I see no significance in the fact that the trial judge did not report the foreman's belief that the jury was deadlocked. Indeed, the defense lawyers had moved for a mistrial on the previous day because of an allegedly hung jury.

The judge responded that he would allow the jury to continue until Friday, and at that time would rule on the motion. Since the verdicts were returned on Tuesday, the following morning, the motion became moot.

On the preceding Friday, July 11, the fourth day of deliberation, the judge advised counsel that some jurors were not feeling well and others were tired. He listed a number of alternatives which might alleviate the jurors' discomfort, including the option of sending them home for the weekend. When the defense objected, the judge acquiesced, although he recalled that this court had approved the practice of allowing jurors in a criminal case to return to their home during deliberations. *See United States* v. *Piancone*, 506 F.2d 748 (3d Cir. 1974). In an effort to ease the jurors' task, the hours of deliberation were shortened but the sequestration contined.

The concurring opinion contends the jury had the mistaken impression that it was required to reach a verdict of guilty or not guilty. But at no time did the trial judge so charge or otherwise suggest this to the jury. Indeed, he was well aware that such an instruction would be error. After the *Fioravanti* charge was given on Sunday, the sixth day of deliberation, the judge and counsel had the following conversation:

> [Defense Counsel]: "That has occurred after Your Honor had on two prior occasions given the charge, first of all in your original charge, then again yesterday afternoon advising them as to their obligation to reach a verdict.
>
> • • •
>
> The Court: I would only point out that I did not charge them as to their obligation to reach a verdict.
>
> • • •
>
> I at no time said they had a duty to reach a verdict. I said they had a duty to deliberate toward reaching

> a verdict. I think that would be error, and I did not do that.
>
> [Defense Counsel]: I didn't mean to indicate you used those words. I used that as a short-hand way of referring to the charge Your Honor had given and I believe in all these instances it was similar to the Third Circuit charge. . . ."

In concluding his remarks to the jury foreman on Monday, the judge said:

> "You tell them to keep deliberating and *see if they can come to a verdict.*" (Emphasis supplied)

I do not read this as a direction to reach a verdict, but rather that the jury should attempt to reach a verdict. This was a perfectly proper admonition. Plainly the judge did not rule out the possibility that the jury could not come to a verdict since the language of his remark was conditional.

In my view it would not have been proper for the judge to have told the foreman at the private conference that the jury had the option of reaching no verdict. The judge had assured counsel in advance that he would give no instruction on the law during the conference and, indeed, the defense lawyers were most anxious that there be no repetition of the *Fioravanti* charge. It is also highly unlikely that thereafter defense counsel would have asked the court to tell the jury about its privilege to return no verdict. For some time before the conference, all the lawyers were aware that the possibility of a true deadlock existed, but no request for additional charge along that line had been made. Moreover, I would doubt that such an instruction should be given. Experience demonstrates that juries should be encouraged to reach verdicts and should not be proffered an "easy way out" by a judicial sugges-

tion that a deadlock is an equally satisfactory alternative. It is the duty of the trial judge to determine when the jury has "hung," and then declare a mistrial. This procedure adequately protects the right of the parties to a "no verdict" trial.[5]

The reasoning of *Jenkins* v. *United States*, 380 U.S. 445 (1965), is not pertinent here. In that case, after only two hours of deliberation, the trial judge stated to the jury in part, "You have got to reach a decision in this case." *Id.* at 446. The Solicitor General's brief referred to the principle that jurors may not be coerced into surrendering views conscientiously held. *Fioravanti* also refers to that principle, and the trial judge here cautioned the jury in that vein on several occasions. *United States* v. *Fioravanti*, 412 F.2d 407 (3d cir.), *cert. denied*, 396 U.S. 837 (1969). The record does not support the assertion that he impermissibly insisted on a verdict.

The decision to declare a mistrial must in large measure be entrusted to the discretion of the trial judge. He is "on the scene" and is in a position to make an informed judgment on the physical and emotional conditions of the jurors, the difficulties involved in the issues submitted to them, and the likelihood that a verdict will be reached. No record can convey all the imponderable factors to an appellate court, nor does its experience better qualify it in any but the exceptional case to second-guess the trial judge. The fact that the foreman thought no verdict could be reached

[5] The problem engendered by a charge to the jury advising of its right to return "no verdict" is similar to that in which a criminal jury would be told that it may disregard the charge and acquit the defendant in spite of the law. While a jury does have such a right, the wisdom of such an instruction has been vigorously debated. *See* the opinion of Judge Sobeloff in United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). *Cf.* United States v. Alper, 449 F.2d 1223, 1233 (3rd Cir. 1971), *cert. denied*, 405 U.S. 988 (1972).

is not conclusive upon us or the trial judge. It is not uncommon that a verdict is returned after a jury has sincerely thought it was deadlocked. The foreman was not endowed with the experience of the trial judge, and it is understandable that with so many complex issues to be resolved, he became discouraged during the deliberations.[6]

This was a lengthy and vigorously contested case, where the factual issues were close and the mass of exhibits formidable. It would seem inconceivable that any reasoned, responsible verdict could have been reached without extended deliberations. Moreover, the expenditure of time, resources and effort on the part of all concerned obligated the trial judge to exert his best efforts to secure a verdict if one could be reached without injustice or coercion. I am convinced that he properly exercised his discretion. The defendants' contention to the contrary rings somewhat hollow in my ears, particularly in view of their objection to permitting the jurors to return home during the deliberations, at least over the weekend.[7]

It has often been said that there are no perfect trials, and the best that our system can provide is a fair one. I believe that criterion was met here and, accordingly, I would affirm.

[6] After the jury returned its verdicts, it was polled several times and each juror unequivocally confirmed the findings of guilt.

[7] It is difficult to understand the defense' reluctance about allowing the jurors to return home since they had done so each evening during the months when testimony was being received. If there had been danger of damaging publicity or improper approaches to the jury, it would not have sprung into existence simply because deliberations had begun.

but it is important to avoid any conversation with competitors about our or their future prices and selling policies because such conversations, even though there is no attempt to or thought of reaching any agreement or understanding, are often looked upon with suspicion, and our policy is to avoid the subject entirely."

By Mr. Keck:

Q. Mr. Bear, who was MacLeish, Spray, Price & Underwood?

A. Well, they were our legal counsel. This was the name of the firm, with which you are presently associated, at that time.

Q. Thank you.

You were asked a number of questions, yesterday and

[1648]

this morning, about price verification. Do you recall that?

A. Yes, sir.

Q. I wonder if you can tell us what are the basic reasons why, in the limited instances in which you made calls, you made price verification calls.

• • •

The Witness: The first reason was—and the basic reason—was to avoid liability under the Robinson-Patman Act requiring us to not discriminate in price between competing buyers, and, in order to avoid such discrimination, we had to assure ourselves that any price that we might quote a given buyer, lower than our regular published price, was made in good faith to meet the equally low price of a competitor.

By Mr. Keck:

Q. Would it be fair to epitomize or summarize that reason as compliance with the Robinson-Patman Act?

[1649]

A. That is what legal counsel has advised me, sir.

Q. Were there any other reasons, Mr. Bear?

The Witness: I believe there is one other basic reason, Mr. Keck, and I believe that reason or that problem arose in some situations where a sharp buyer would attempt to play one manufacture against another in order to obtain a lower price for himself. He very often—quite plainly, in our opinion—was lying to us. And we were advised by counsel that we were entitled to protect ourselves against the fraud or attempted fraud perpetrated on us by such a dealer through the medium of price verification.

[1650]

By Mr. Keck:

Q. Well, then, could I summarize your second reason as protecting against fraud from the lying buyer?

A. Yes, sir.

Q. Were these the principal reasons for your price verification calls, or were there others?

A. Those were the principal ones, sir.

• • •

[1709]

Q. You testified this morning, in answer to questions of Mr. Thorson, that you had not made any verification calls to or received any from a Mr. Huckleberry. Do you recall that?

A. Yes, sir.

Q. You gave a reason why you had not. I show you a document and ask you if that refreshes your recollection as to whether there was still another reason why you had

teriorating and my motive was to try to keep it from deteriorating any further. It was much lower in our market than in other places in the United States and I didn't think it was right and I wanted to prevent the continued decline, so our company could make money. We were losing money and I wanted to prevent the price from sliding down, so we could stay in business.

Q. How did this exchange of pricing information accomplish your objective?

A. It didn't in the long run, no. In the short run, it might have slowed the price decline down.

Q. What area are you speaking of?

A. I am speaking of my prime market, the Southwest, Texas, Oklahoma and the states surrounding.

Q. Mr. Simpson, were you at all concerned about the legality of these discussions that you were having with your

[1897]

competitors?

A. Yes.

Q. Did you continue to engage in them, in any event?

A. I did, yes, sir.

Q. Why?

Mr. McSweeney: That question has been asked and answered.

The Court: He just told you why.

Mr. Fricano: All right.

By Mr. Fricano:

Q. Did you have any other motives or any other reason other than the business one you just advanced?

A. Well, I had, at that point. I was concerned about the legality of it, yes. I convinced myself that I had the right to do it under the Robinson-Patman Act.

Q. Did you continue on thereafter, then?

A. Yes.

Q. Did you keep a record of conversations which you had with your competitors over the period late 1964, '70 or '71?

A. No.

Q. Why not?

Mr. Bartlit: I object, irrelevant, Your Honor.

The Court: Well, let's change that and

[1898]

see whether anybody told him not to. Just why he didn't, I agree, is irrelevant.

By Mr. Fricano:

Q. Did it ever occur to you that you should be making a record of your conversations for Robinson-Patman Act purposes?

Mr. Bartlit: Objection, irrelevant, Your Honor.

Mr. Fricano: If Your Honor please—

The Court: I think that is all right.

Mr. Warnke: I would further object. It calls for a legal opinion and you have already addressed yourself to that kind of question.

Mr. Fricano: If Your Honor please, on cross-examination of Mr. Bear one legal opinion after another was elicited.

The Court: I know, and I said I didn't want any more.

Q. And if he answered yes, what did you do?

A. We would meet the price, generally speaking, to the best of my recollection.

[3587]

Q. You made your own decision, whether you would or would not meet the price. You didn't meet it in every instance, did you?

A. I have no recollection as to the specifics in that regard, but we would make a decision after we—after we verified it.

Q. Now, I would like to turn, Mr. Gimlin, to the purpose of USG in engaging in the practice of price verification, and I will read to you from yesterday's transcript at page 3343.

Mr. Fricano asked, "What was the purpose of United States Gypsum engaging in this practice, this understanding of exchanging this kind of information we have been talking about?"

And you answered: "So we wouldn't be over-competitive on price."

Do you recall that?

A. Yes, sir.

Q. Now, I would like to ask you, Mr. Gimlin, why you did not want to be over-competitive, and specifically ask you if it is not a fact that one of the reasons that you did not want to be over-competitive was so that you could be in compliance with the Robinson-Patman Act.

A. Yes, sir.

Q. You were told by counsel, were you not, on many,

[3588]

many occasions, that it would be illegal, under the Robinson-Patman Act, generally speaking, to sell at a lower price to a customer, unless you were meeting in good faith the lower price of a competitor. Is that not correct?

A. Yes, sir. That would be correct.

Q. So, in those instances that we have on the chalk board, number 4, number 5, number 6, if you had a substantial doubt about the truthfulness of the claim from the customer, that he, in fact, had a lower price from a competitor, had you not been advised by counsel that it would have been illegal for you, under the Robinson-Patman Act, to meet that lower price?

A. Yes, sir.

Q. And, in fact, when you did have such a doubt, you did not meet that low price? Is that not correct?

A. Yes, sir.

Q. So the practice of verifying with a competitor in some cases, when he said he did not—did not have the lower price, that didn't change anything; did it?

A. No, sir.

Q. Where the competitor said, "Yes, I do have a lower price," that enabled you to meet that price that you would not have been able to meet in the absence of the verification call; is that not correct?

A. Yes, sir.

• • •

[3589]

Q. When you got a negative response from your competitor, when you called him, and he said, "No, the report is not true," then you did not meet the claimed lower price; did you?

A. No, sir.

Q. And you did not do that, at least in part, because you had been advised by counsel that it would be illegal to

[3590]

do it under the Robinson-Patman Act; is that not correct?

A. Yes, sir. That is correct.

Q. Now, if you had not verified with the competitor and if it were a situation where you had a substantial doubt about the truthfulness of the report, such as in cases 4, 5, and 6 on the chalk board, you doubted the truthfulness of the claim, then were you not advised by counsel that it would be improper to meet the lower price under the Robinson-Patman Act?

A. Yes.

Q. And you did not meet it in those cases, did you?

A. No, sir.

Q. So that, if you got a negative response from your competitor when you called him, that didn't change anything as far as what you did; did it?

A. No, sir.

Q. If you got an affirmative response from the competitor when you called him, and he said, "Yes, the report is true, I am selling this customer at $48," then, that enabled you to make a decision whether you would or would not meet that price. Is that not correct?

A. Yes, sir.

[3591]

By Mr. Hiering:

Q. And in many cases you did meet when you got such a response, did you not?

A. To the best of my recollection, generally we did.

• • •

Q. So that when you got a negative response from the competitor, he said that the claim was untrue and you did not meet that lower price, to the extent that this had a stabilizing effect on prices, was this not due to the fact that you were following the directions of your counsel with regard to compliance with the Robinson-Patman Act?

A. Yes, sir.

[3592]

Q. Now I would like to turn, Mr. Gimlin, to some further questions about verification and the nature of verification calls.

When you made a verification call, is it not a fact that you made this call to get information on which you could base your independent decision to meet or not to meet the claimed lower price?

A. Yes, sir.

Q. Is it not also a fact that when you made these calls you asked your competitor whether the claim made by the customer was true with respect to the price at which he had sold or was selling or had offered or was offering the product? Is that not correct?

A. Yes, sir.

Q. You did not ask him, did you, whether he was going to continue to sell at this price?

A. No, sir.

Q. And you didn't ask him whether he intended to increase the price?

A. No, sir.

Q. And you didn't ask him whether he intended to decrease the price?

A. No, sir.

Q. And you didn't ask him anything else about what he intended to do or would do in the future?

[3593]

A. No, sir.

Q. Nor did you tell him what you intended to do?

A. No, sir.

Q. Or what you would do?

A. No, sir.

Q. By way of summary, when you made these calls you wanted information that you could use to make your own independent decision, is that not correct?

Q. How do you know that, sir?

A. Well, I dealt with many of them. I have been told this. I know it for a fact.

Q. That they would tell each other that they were getting discounts notwithstanding the fact that the invoice didn't show the discount?

A. Yes.

Q. Then why go through this business to begin with?

A. You are asking me to speculate again, sir.

Q. All right, sir. Isn't it a fact from time to time you gave a discount to one customer of yours and didn't give a discount to another customer of yours who competed in the same marketing area?

Mr. Mellott: I object to the form of the question unless the time frame is tied down.

Mr. Fricano: Throughout the time period 1962 through June 1969.

The Witness: Should I answer it?

The Court: Sure.

[4380]

The Witness: Mr. Fricano, we have been through the process, I believe, of exploring discounts granted to customers of certain trade classification, including job price protection. The verification practice—if you will—in my understanding and under the guidance of our Legal Department, was set forth to establish as best we could the means to avoid violation of the Robinson-Patman Act.

If we gave a discount to a trade factor, if we gave a certain price concession, whether it be in the form of a discount or otherwise, to a certain trade factor, which was different from another trade factor

in this same place of trade, it was based upon the process that our Legal Department had established for that purpose.

By Mr. Fricano:

Q. So then . . .

A. And that meant that we were either in the process of meeting competition according to our best judgment, or we were making a business judgment without doing any kind of verification practice.

Q. All right. Then is it fair to say, sir, that the answer to my question is "yes" with that explanation that you just gave?

A. With the explanation that I just gave, my answer would be yes.

[4381]

Q. Now, did these same lawyers tell you to put phony invoice prices on the invoices?

A. Phony?

Q. That's right. Fictitious. Unreal. False.

A. Fictitious? I don't agree with that at all, sir.

Q. I didn't ask you if you agree.

A. I don't agree with that characterization.

Q. I didn't ask . . .

A. You asked me to answer.

Q. I ask you specifically: Were the list prices that were on the invoices not the actual prices? We won't characterize it any further than that.

The Court: I think we will be better off not calling it anything. Just describe it.

• • •

Q. Was he also at these meetings, these Gypsum Association meetings thatyou attended?

A. Some of them, sir.

Q. When you made a call, from time to time, and, from time to time when there was an incoming call, did either you or the other person refuse to give out the information concerning the price?

A. Yes, sir.

Q. Why?

A. I don't know why the other person would refuse, but I know why I would.

[5268]

Q. Why did you refuse?

A. There were certain accounts that we felt were extremely important to the interests of Georgia-Pacific, that we felt was not in our best interest to discuss our marketing policies.

Q. Would one of those accounts be M. Ecker and Company in Chicago?

A. Yes, sir.

Q. Were they a large volume account of Georgia-Pacific?

A. At one time, they were; yes, sir.

• • •

[5273]

Q. • • • If you wouldn't discuss certain accounts, why did you check prices with competitors on other transactions?

A. We were concerned with the ramifications of the Robinson-Patman, for one reason. We wanted to be sure that we were not being led on by a dealer who wasn't telling us the truth. So it became necessary at times, on rare

occasions, to verify the existence of a competitive price. Sometimes, I frankly doubted that it was true.

Q. Were there any other reasons, sir?

A. That would be the main reason, sir.

Q. Is it not fair to say one of your reasons was so that Georgia-Pacific would not lower its prices beyond that what the actual market condition warranted?

A. I have given that one a lot of thought, too, sir.

Q. That is in your Grand Jury testimony?

A. Yes, I know it is, and in thinking about it, the price had already been lowered when a price verification had been made, or it was represented it had been lowered. I am not sure that's true.

Q. You are now saying your Grand Jury testimony is not—

[5274]

A. I am not sure it is accurate. I am not sure I was speaking correctly.

Q. You said you gave it a great deal of thought. Did anyone help you in your thinking?

A. I am sure everybody helped me, sir.

Q. Has Mr. Mellott helped you?

A. Yes, sir, you betcha.

Q. Have any other personnel at Georgia-Pacific helped you?

A. You mean have I—

Q. Have you discussed it with other people at Georgia-Pacific?

A. I have discussed it with Mr. Wilson at times, yes.

Q. Did he help you, too?

A. Yes, sir.

Q. Now you have testified that you wanted to make sure that the customer was telling you the truth, is that right?

Q. Do you recall making any price verification call or receiving any price verification call in the year 1969?

A. Well, I don't recall any specifics. It is very possible in the early part of the year that I did, because

[5532]

of the habit of people calling me. I wouldn't be originating them, because other people had that responsibility. But others might call me, not knowing that I was on a special assignment.

Q. You say "might." Do you recall?

A. No, I do not.

Q. And since you left, your official leaving at the end of the year, even though you hadn't been there physically for some time, the end of '69, from that period on you haven't been involved in the gypsum business; have you?

A. Not in any way at all.

Q. Mr. Meyer, with respect to price verification practice where you made calls to verify a price or other competitive practice with a competitor, did you do that in the circumstance where you had received a report from the Georgia-Pacific organization of a lower price or a competitive condition out in the marketplace?

A. That is right. That is where those things originated.

Q. And the information came to you from Georgia-Pacific employees who had gotten it from customers?

A. Correct.

Q. And the purpose of the customer advising of the lower price was so that that customer could get a lower price?

A. From us, to meet a competitive price.

Q. Yes.

[5533]

A. That he allegedly received from someone else.

Q. What I mean is: The customer would advise the Georgia-Pacific individual of a lower price of a competitor and requested Georgia-Pacific to give a lower price?

A. That's right.

Q. And as a result of that request by the customer coming to you through the organization, you sometimes made a verification call with a competitor?

A. Yes.

Q. And when you made that call, did you make it to verify the existence of a lower offered price or other practice that had been made or offered before the time that you made your telephone call to the competitor to verify it?

A. Yes.

Q. And you made that verification call to find out the truth; is that it?

A. That's right.

• • •

[5539]

By Mr. McSweeney:

Q. Mr. Meyer, I believe in answer to Mr. Fricano you said that you understood that Celotex directed the prices of Big Horn Gypsum. I take it that you do not know that as a fact, do you?

A. I know it as a fact from having been told so by Mr. Miller.

Q. Mr. Miller of Celotex told you that?

A. That is correct.

Q. When did he tell you that?

[5645]

correct.

Q. Was there also a significant percentage of them that was incorrect?

Mr. Fricano: Objection.

The Court: He is entitled. It is cross-examination.

Go ahead.

The Witness: That could be.

By Mr. Mallin:

Q. Now, at the time that you were with Georgia-Pacific, did you understand that it was the policy of Georgia-Pacific to attempt to avoid price discrimination to customers located in the same trading area?

A. Yes, sir.

Q. And did you in your job function, to the best of your ability, attempt to carry out that policy of nondiscrimination?

A. Yes, sir.

Q. And did you understand that it was the policy of Georgia-Pacific, when faced with a lower price being offered by a competitor, to attempt to meet that competitive price but not to beat it?

A. That is correct, sir.

(Proceed to next page—no loss of context.)

[5646]

Q. So that you understood those to be company policies during the time you were with Georgia-Pacific?

A. Yes, sir.

Q. And did you understand that those twin policies of non-discrimination in the trading area and meeting but not beating competition were complementary policies?

A. Yes, sir.

Q. And did you understand that price verification calls was one method that was used in order to implement those twin policies of non-discrimination in the trading area and meeting but not beating competition?

A. Yes, sir.

Q. Now, when you received a report from Georgia-Pacific's own sales organization of a lower price in a particular area, was it sometimes true that, based upon other information received from Georgia-Pacific's own sales organization, that you could decide to meet that price by Georgia-Pacific?

A. Yes, sir.

Q. And you could make that decision on those occasions without making a price verification?

A. That's correct.

Q. And, on other occasions, you made the price verification call to ascertain what that truth was?

A. Yes, sir.

[5647]

Q. Now, in a case where there was a report from the sales organization of Georgia-Pacific that indicated there was a lower price, was it sometimes true that you didn't believe that report?

A. That's correct.

Q. And did you understand—strike that. And, in the case where you didn't believe the report, you would not meet the lower price?

A. That's correct.

Q. Now, if, in that case where there was a report from the sales organization, which you didn't believe, and you made a vertification call and found out that the report was, in fact, true, then you were in the position to meet that lower price?

A. Yes, sir.

Q. And so the making of the price verification call, in those circumstances, made it possible for Georgia-Pacific to put that lower price into the marketplace?

A. That is correct, sir.

Q. Incidentally, Mr. Sikes, did you attend Gypsum Association meetings?

A. No, sir.

Q. During the time you were with Georgia-Pacific, did anyone instruct you not to keep a record of price verification calls?

[5648]

A. Never had any such instructions.

Q. And the notes—but it was a fact, on various papers, some of which have been used by the Government, you sometimes made notes about price verification calls?

A. That is correct.

Q. And sometimes, in your notes, you used shorthand symbols to make those notes?

A. Just the 1, 2, 3 code.

Q. Well, did you write anything out in the notes in longhand, or did you use abbreviations or any other kind of symbols, like people do when they are making notes?

A. Oh, initials, made it brief.

Q. Were you able to read everybody else's shorthand notes made in the office on whatever subject—

Mr. Fricano: Objection, outside the scope of direct examination.

The Court: I haven't heard any testimony about shorthand. I don't know what we are getting at here.

Mr. Mallin: Well, there was questioning, Your Honor, about the way he kept notes and whether

A. To my knowledge he didn't do it, no.

[5727]

Q. Well, is that your present knowledge, too?

A. My present knowledge of course, since the document was brought up late in '69 stating that I had written to them, that there was some reason for me to write the document, that I don't really know. And that was after price verification had stopped on my part.

Q. But not on theirs?

A. I don't know anything about their part.

Q. Why did you write them the document?

A. I wished I knew that. I don't know.

Q. Were you in here when Mr. Sikes was testifying?

A. Yes, I was.

Q. Did you hear Mr. Sikes testify that he engaged in the verification practice with Mr. Earl Kroth?

A. I heard that.

Mr. Fricano: If Your Honor please, I think perhaps one of the jurors might wish a recess.

The Court: Well, I am not going to ask, but we will take a ten-minute recess.

(Recess taken.)

The Court: Proceed.

By Mr. Fricano:

Q. Mr. Atwell, who then at National Gypsum authorized you to engage in verification, as you have described it?

A. Mr. John Brown.

[5828]

Q. Who else?

A. Well, he is the only one that authorized me.

Q. Did Mr. Nicely authorize you?

A. Well, I was doing it at the time Mr. Nicely became my superior, and no one said to stop.

Q. How about Mr. Colon Brown?

A. I never talked to Mr. Colon Brown about this at all that I know.

Q. Mr. Atwell . . .

A. Yes, sir.

Q. Didn't you from time to time discuss a specific price verification with a competitor when Mr. Brown was standing right there?

A. Never to my knowledge, no, sir.

Q. Did Mr. Brown, Colon Brown now, was he aware of the fact that you were engaging in this practice?

A. Well, I didn't talk to him about it, but I think he was, yes.

Q. Now, with respect to job price protection itself.

A. Yes, sir.

Q. Did you from time to time check with your competitors on job price protection?

A. Even though I don't recall it, there is a possibility I did, yes, sir.

Q. And at what time, times, did job price protection

[5729]

become more critical?

A. With National, job price protection became more critical at the time of a price increase.

Q. Would that be between the time of an announcement and the time of the effective date?

A. Generally it would be between the time of our announcement and our effective date, yes, sir.

Q. Is it fair to say that if there is job price protection in the market, enough of it . . .

A. Yes.

[5835]

Q. All right, sir. Now, it refers, in paragraph 8, to "our new policy." Do you see that, paragraph 8?

A. Yes, it does. Yes.

Q. All right, sir. When was that new policy formulated?

A. I don't know that the policy was even formed at that time. This was—this plan of action was a result of a meeting we had, saying what we were going to do after we heard that USG had announced a price increase in the field, and this, to me, means when we decide, and I don't know when this was made. We may have made a decision by then, but, at any rate, if and when we decided, we would send that new policy to the people, the states.

Q. Well, isn't it fair to say, Mr. Atwell, that the new policy referred to there had to be formulated prior to November 17, 1965?

A. No. No.

Q. Was that new policy discussed on November 17, 1965?

A. Yes, it was.

Q. With whom?

A. A meeting that we had with Mr. John Brown and Mr. Jay Nicely and Mr. Manske.

Q. And what was the new policy?

A. The policy was we were going to try to find out what USG did, and we were going to follow it just as closely

[5836]

as we could, and that would be our policy, and we would let our dealers know it and our sales people know it and all.

Q. So you were going to prepare a letter, Mr. Brown was going to help, and Mr. Nicely, and you were going to

send it to all your dealers throughout the country, saying you were going to be just like USG; is that right?

A. I wouldn't say it in those words, no, but that would be the intent. We were going to follow it, whatever we found it to be, we were going to follow it.

Q. Have you, in the past, told your dealers you wanted to be just like USG?

A. I don't think we ever did.

Q. Well, that doesn't mean that, then, does it?

A. I wouldn't send a bulletin out and say we were going to be like USG or anyone else. It would be a policy that would recite things that we want to have done, and it would have been, and they were, at that time.

This is just about the same as those we picked up.

Q. Did all the events, as depicted on GX 500 actually occur on the dates specified?

A. Oh, you want me to go down item for item, sir?

Q. Well, if you can glance at it, sir—

A. Well, on November the 17th, we knew there was a letter out. We had had a call from one of our people, and we were going to procure that from our man who had called in,

[5837]

and that we did not have on the 17th, no—and, when the man called in on the second item, he also told us that he had a copy of a USG letter of November 17, too, the sales force, and we told him to send that in, and we were going —this is what we meant by procuring that, getting that into the Buffalo office.

On the 19th, "Procure USG price list for all zones," this was living in hope. We were going to go out to our people and tell them of what we heard and tell them to pick up what they could and send it in to us, and we had

hoped, within a few days, we could get all the information we needed.

Q. And, ultimately, in that connection, you had to call United States Gypsum directly; did you not?

A. I don't recall whether I did or not.

Q. Didn't you get what is called a mint set of USG price sheets about an inch thick?

A. We—yes. Yes.

Q. And were these not United States Gypsum prices, for the United States Gypsum products in every zone?

A. I do know that it was a thick file, but I can't testify it was for every zone. I don't know that.

Q. All right, sir. Proceed.

A. Then, it appears here, and now—except for jumping down to the 24th, I would be testifying from the document, because my memory doesn't serve me that well.

[5838]

By Mr. Fricano:

Q. All right, sir.

Now did you know or were you aware, I should say, that originally United States Gypsum intended to announce its price increase not on November 17, but on November 15?

A. This is the first time I ever heard that.

Q. All right.

Do you know whether or not they intended to announce it in the Wall Street Journal, as you said about your decrease yesterday?

A. The first time I knew was when our man called from Chicago.

Q. What—

A. Mr. Wright.

Q. Did Mr. Wright tell anybody where he got that information?

A. Oh, yeah, competitive invoices or believing the customer or things like that.

Q. How did you verify the report the customer made was true, except by calling your competition? What other methods did you have?

A. Well, we request of our salesmen right now, and did then, to send us whatever documentation he could get from the field and those would be competitive invoices, or to get a customer to sign these RTMC's or requests to meet competition forms or get a letter from a customer. And in some cases we just believed the customer, because we have never—we have always found him to be trustworthy.

Q. Did you ever have occasion to—you, Mr. Atwell, when you were passing on one of these requests to meet competition, did you ever have occasion to check back with your field sales people who had reported the situation to find out whether they could assure you of its reliability or accuracy?

A. You mean after I got a request from them, did I contact them again?

Q. Yes.

A. Oh, yes. I was on the phone with them regularly, yes.

[5988]

Q. When you called back to them, did you always make notes of your conversations with them?

A. No, I didn't make any notes.

Q. What did you, on these forms, if the request was approved, those that came to you, you have to sign to indicate your approval or not, I guess, didn't you?

A. Well, if I approved it, I signed it. And I think in most of the cases where we didn't approve it, we wrote reject on the face of the document, as I recall.

Q. Now, in those instances when you did call a competitor—

A. Sorry.

Q. Are you all right?

A. I'm all right.

Q. The mike is still working, too.

A. Yes, it is. It doesn't have a sore throat, though.

The Court: Do you have a sore throat?

The Witness: Yes, I do, but I think I am going to make it all right.

By Mr. DeLone:

Q. In those instances where you did call a competitor out of, say, in 1965, out of these 40,000 requests, where you called a competitor sometime between zero and six times a week, why did you in those certain limited number of

[5989]

cases call the competitor to inquire about the offer, the report that had come up to you from the field?

A. Those were the reports where I had very serious doubts about the type of report, the veracity of the dealer. Sometimes I felt that the dealer was untrustworthy, so I decided I would protect our company by checking them.

Q. Protect your company from what?

A. Against illegal discrimination among our customers in the field.

Q. What do you mean illegal discrimination?

A. If we had a report of a low price and I didn't do my very best to try to make sure that that report was true and I gave that and didn't give it to the rest of my customers, I would be discriminating against my other customers.

Q. And wasn't your understanding—was it your understanding, whether or not it was right, that it would be unlawful to so discriminate against other customers?

A. Yes, it was.

Q. Have you been advised about any statute or laws that concern this subject?

A. Yes.

Mr. Fricano: Objection, Your Honor.

The Court: The basis?

Mr. Fricano: He is asking a layman

[5990]

about the law now.

Mr. DeLone: I didn't ask him the content of the law. I asked if he had been advised about the law.

The Court: You can answer.

The Witness: Yes, sir. I was told about the Robinson-Patman Act.

• • •

[6038]

The Court: Yes. May I call your attention, Mr. DeLone, though, to what Exhibit 15 says? The first paragraph is not—doesn't give me any trouble, then, but it refers to the conference with the lawyers. Then, they quoted the section of the Robinson-Patman Act which upholds our theory. However, they brought to our attention, also, a recent decision by the United States Circuit Court and the only one squarely deciding the precise issue; that is, the Sunshine Biscuit case. Then, they go on to say that the FTC argued Section

it was, Jay Nicely called me at some later time. Now, it may have been the same date, or it may have been the next day. The reason I think it was near the time I talked to counsel is, when Jay called me from out of town, he said he had just read something about this in the Wall Street Journal.

Q. And what was the gist of your discussion with Mr. Nicely, as best you recall it?

A. Well, Jay talked about the article, and he said that—

Q. The article in the Wall Street Journal?

A. In the Wall Street Journal; and he said that he thought that it would be advisable for us to cease and desist, and I told him I had already talked to counsel and already made the decision.

Q. Now—

[6073]

The Court: Cease and desist from what?

The Witness: Well, stop making verification calls.

By Mr. DeLone:

Q. Now, except for the credit—you weren't responsible for the Credit Department and its activities; were you?

A. No.

Q. And that wasn't under your decision?

A. No, it wasn't.

• • •

[6076]

Q. I show you also Government Exhibit 25. Do you have that there? Maybe I didn't ask for that yet.

A. I don't have it.

Q. Sorry.

What is that exhibit, Mr. Atwell?

A. This is a letter I wrote to Mr. Hayes and Mr. Nicely on December 12, 1969, and the subject is "Price Verification."

Mr. DeLone: Again, this is marked a Government exhibit. I will offer it.

Mr. Fricano: I will offer it, Your Honor.

Mr. DeLone: If Mr. Fricano wants to offer it, that is fine.

The Court: It is admitted.

Government Exhibit No. 25 was received in evidence.

Mr. DeLone: This document is dated December 12, 1969, from Mr. Atwell, subject, "Price

[6077]

Verification," directed to J. P. Hayes, Vice President, J. P. Nicely, Vice President, reads as follows:

"Dear Jack and Jay:

"I believe I did advise you men of the following action taken by me early this year to stop price verification calls in the building products division of our company. I am not sure Colon was ever made aware of this decision. As chief executive of our company, I think he should have this information. If you agree, please route the extra copy to Colon.

"As you know, I have been in constant touch with outside counsel for several years regarding antitrust regulations. Very early this year, coun-

sel advised me of the decisions in the Container case and emphasized the telephone price verification aspect of that case. Even though this activity in the Container case is significantly unlike that which was infrequently used by us, we were advised that until clarification of the Container decision, "serious consideration should immediately be given to complete cessation of verification calls." Based on this counseling, and only as a result of this counseling, I have made no verification calls since some time in January, 1969.

"We, at National Gypsum Company, know we did not violate our internal antitrust policies nor the laws

[6078]

of the land as regard to antitrust. We did not discuss future prices, policies, terms or conditions of sale with any competitor, nor did we enter into, or discuss, any agreements on any of these items, nor on distribution, sharing of markets, selection of customers, etc. We simply answered specific inquiries with a yes or no and only inquired about specific reports received from our sales force of competitive activity. I am knowledgeable of the above because I believe I am the only one who made any of the occasional verification calls by our building products division in many years.

"However, making the above decision doesn't necessarily lead me to believe we have no other concern. To the contrary, I continue to be concerned about possible inadvertent violations of the Robinson-Patman Act. We have done our best in good faith to make our decisions in meeting competitive situations on whatever evidence was available. There may have been cases where we

were deceived by customers, and as a result, met false competitive reports. This leaves a question in my mind as to whether or not we have exercised every precaution legally obtainable. This kind of decision making will be a risk that, in our division, we will continue to take until we get further clarification of the legality of telephone price verification calls where the purposes thereof are to avoid fraud and to obey the federal laws against price discrimination among customers.

"K. H. Atwell"

[6079]

The Court: What is the date of that?

Mr. DeLone: December 12, 1969.

By Mr. DeLone:

Q. Mr. Atwell, might I ask you, this makes mention of Colon and refers to Colon as chief executive officer. I take it that is Colon Brown?

A. Yes, it is.

Q. Do you recall why you wrote, what occasion you are writing this letter to Mr. Hayes and Mr. Nicely in December, 1969?

A. Well—

Q. December 12, 1969, to be precise.

A. Mr. Colon Brown and Mr. Jack Hayes were going to be called as witnesses in some litigation and although I don't ever recall telling Mr. Colon Brown about price verification, the complaint in 1967 that led to this litigation had as one of its items price verification. So it was, I assumed, of course, since it was a complaint which Mr. Colon Brown knew about the price verification, but I didn't know how much he knew, if anything, about us stopping verification.

A. If I did, I don't recall. I don't recall the name, or I don't really recall specifically doing it, no.

Q. When you made these contacts with competitors, did you get answers to your questions?

A. In most cases.

Q. What would you do with the information after you received it? Would you take it back to Mr. Atwell or Mr. John Brown, or Mr. Nicely, or whoever made the request that you check it out?

A. In some cases, yes. And in some cases, no. In some cases when I was requested to find out if the price exsited, I was told that if that competitor does have that price in there, that I was authorized to meet that price

[6238]

for our own customer. And in that case then I wouldn't have to go back to my superior.

In other cases, yes, I had to carry the information back. And then we possibly talked about it to make a determination. "Is there any advantage to meeting this price?" "Should we pass up the order?" Or, "Do we meet the price and hopefully get an order?"

Q. What was your purpose in contacting the competitor if you weren't sure whether or not you were going to meet the price to begin with?

A. Well, it is pretty hard to run a business unless you know what is going on in the market. And even if you might not meet the price, maybe you can't afford to meet the lower price. It still—Maybe it is a matter of ego, but you sure would like to know what is going on in the market as far as price is concenred.

Q. Did you make any notes of these contacts with competitors?

A. No, I didn't.

Q. Do you know whether or not Mr. Colon Brown knew of these contacts by yourself and Mr. Atwell, and others in National Gypsum Company with competitors?

A. He knew that Mr. Atwell was calling competitors. I am not sure that he knew that I was making calls.

Q. How do you know—Excuse me.

[6239]

A. I am not sure that they knew that anybody else was making calls.

Q. How do you know that he knew Mr. Atwell was making calls to competitors?

A. On a few occasions, at least a few occasions, I was present when Mr. Atwell advised Mr. Brown—Mr. Colon Brown that is,—that he had contacted a certain competitor and confirmed that a certain discount or a certain price was in at a certain dealer or in a certain market or what have you.

Q. This was in your presence?

A. Yes, it was.

Q. Was anyone else present on these occasions?

A. I believe in a few cases there may have been other people present, but I don't recall who they were.

[6240]

Q. Do you know what time period these occasions took place in?

A. It was in the later sixties, but I can't be real specific as to when they—when they happened. I could pin it down to the point of somewhere in about late '66, early '67, possibly, when they were still not meeting competition, when they were still not lowering our price to be competitive in the market.

• • •

[6280]

RE-DIRECT EXAMINATION.

By Mr. Schmoll:

Q. Mr. Kroth, you say you stopped making these contacts with competitors in mid-January of 1969. Why did you stop?

A. The company's legal counsel advised us, advised the management of the company that there had been some court decision—which I have heard referred to as the Container Case—where the judge had ruled that it either was illegal, or there was some question concerning the legality of price verification. And, until further clarification, we were told to cease and desist.

Q. Who told you this?

A. I was either told by Mr. Atwell directly or in conjunction with one of the attorneys.

Q. Do you know whether or not anyone else at National Gypsum was told that they should stop?

A. To my knowledge, all of the people in our own department who in any way would be involved with this type of procedure were informed.

Q. Do you know whether or not those instructions were followed?

A. To the best of my knowledge they were, except in one case that I know of where apparently the party became confused.

Q. What case was that?

[6281]

A. The case of Mr. Webster.

Q. Did Mr. Webster make calls after these instructions were issued, receive calls?

Mr. DeLone: It was about the time of his conversations with Mr. Atwell, and I submit, sir, that what I read shows his vagueness of recollection.

The Court: Now, wait a minute.

Mr. DeLone: Well, in light of—

The Court: Wait a minute.

Mr. DeLone: Very well.

The Court: Let's not either one do that. When you spoke about these conversations, were you talking about area prices, or were you talking about conversations concerning a specific—a request to verify price on a particular transaction? I am talking about the ones as late as 1967.

The Witness: Well, it is difficult to be specific.

The Court: Was it both?

[6312]

The Witness: Yes.

The Court: All right. Go ahead.

The Witness: To the best of my recollection, both.

• • •

[6314]

By Mr. Keck:

Q. You have been asked certain questions about verification, and I understood you to say, did you not, that you had not verified with anyone from United States Gypsum Company?

A. That is correct.

Q. At any time?

A. That is correct.

Q. Would you please describe simply for me the practice of verification as you practiced it, as you have testified here this morning? What prompted you to make a verification call?

The Court: You mean—he said he didn't do it with United States Gypsum.

Mr. Keck: He didn't do it with my clients, but he said he did do it with some others.

The Court: All right.

The Witness: Uncertainty as to the validity of the competition, for one thing.

By Mr. Keck:

Q. Did you have a way of determining the existence of lower competitive prices within your company?

A. Well, we would ask to see invoices of competitive

[6315]

companies to verify whether or not they were selling at below our prices or not. We have a field sales force that we depend on heavily to keep us advised as to what the competitive situation is in the market.

Q. And how do they keep you advised?

A. Through reports and telephone conversations; very few written reports.

Q. Well, then, do I understand that, occasionally, you would verify the existence of the lower competitive price by a contact with a competitor?

A. That is correct.

Q. How did you determine which ones to verify and which ones not to verify?

A. It was just a matter of judgment as to the feel we had for the particular account, whether or not we were

being told the truth as to what the competitive situation was or not.

Q. The truth by whom?

A. By the dealer.

Q. The customer ?

A. To our—that's right, the customer, to our salesman or direct to me.

• • •

[6319]

By Mr. Mellott:

Q. Mr. Montgomery, my name is Cloyd Mellott. I represent Georgia-Pacific. Would you look at the two pages of 1668-A, Government Exhibit 1668-A and tell me, please, whether the names of any Georgia-Pacific employees appear on your list of telephone numbers.

A. No, they do not.

Q. All right, sir.

If I understand your direct testimony correctly,

[6320]

the only person at Georgia-Pacific that you had any verification calls with was Gene Burch.

A. Yes, sir.

Q. And I believe—excuse me.

A. Yes, sir, that is correct.

Q. And I believe you said you had two, three or four, is that correct?

A. That is correct.

Q. Isn't it a fact that each of those calls was originated by you?

A. That is correct.

Q. Mr. Burch never called you?

A. Not to my knowledge.

Q. And what law is that that you are referring to?

A. I have referred to it as the Robinson-Patman Act.

Q. Now, if the green sheet is processed with the approvals, as you described, what happens next?

A. If the green sheet is processed and the recommendation is that we meet the competitive situation, as I say, it is forwarded to whomever has—through what channels are appropriate at the time—to whomever has final authority to approve the recommendation.

Q. And if it is approved, then what happens?

A. Then it becomes the basis for the Accounting Department to invoice at that lower price or to adjust to that lower price.

Q. And what is the Accounting Department authority for that purpose?

A. The P/A.

Q. And that's the pink document on the right; is

[8903]

that correct?

A. That's correct.

Q. Have you ever had any advice from your lawyers with respect to compliance with the Robinson-Patman Act?

Mr. Fricano: Objection.

Mr. Hiering: I am not asking him for a legal conclusion, Your Honor. I am just asking him whether he had any advice from lawyers with respect to compliance with the Robinson-Patman Act.

The Court: You can answer it yes or no, but you can't ask him what the advice is.

The Witness: Yes.

By Mr. Hiering:

Q. On more than one occasion?

A. Yes.

Q. And were there occasions when you asked specific advice from your lawyers with regard to approval of price adjustments?

A. Yes.

Q. Now, were there instances when the information regarding the competitive situation, as contained on the green sheets, raised doubts in your mind as to the accuracy or the truthfulness of the report of the competitive situation?

A. Yes.

[8904]

Q. And what did you do in those instances?

A. The usual procedure is to send the file back to the initiating, or back to the responsible sales manager, and tell him that he needs to get additional information or you can't approve that particular price recommendation.

The Court: The reason I ruled that he couldn't ask what the advice was is this:

You ask a lawyer for advice—and I like to think judges are still lawyers. If you ask a lawyer for advice—and I don't mean to derogate the advice—and he gives it to you. And, by following his advice you violate the law, it is still a violation of the law. That doesn't make it okay just because a lawyer advised you to do it. That's why what the advice was may be relevant in some situations. But, in the matter that we have before us today, I don't think it is.

By Mr. Hiering:

Q. Now, were there ever any instances when you doubted the accuracy or the truthfulness of the claim of

the lower competitive price made by the customer where you check the accuracy of that claim by calling a competitor?

A. Yes.

Q. And can you give us some approximation of how many instances?

A. They were very few. I would estimate not more than

[8905]

ten, and probably less.

Q. When was the last occasion when you made such a call?

A. I don't specifically recall the last date on which I made such a call.

Q. Approximately when would it have been?

A. Well, it would have been—No later than 1968, and possibly earlier than that.

[8906]

Q. Why did you stop making these calls?

A. Well, the reason I stopped making the calls was when I—as the year 1967 progressed, the market became increasingly more competitive, and the field intelligence we were receiving started to flow in with increasing frequency, and that, by 1968, it was—there was a considerable number of green sheet forms flowing in every week, maybe every day, so that it—in my mind, by that time, because of the very competitive nature of the market, I had all the information at hand that I needed to deal with the price adjustment requests that were coming to me and to feel that I had a good faith meeting of competition.

• • •

Q. Now, you knew the practice was going on yourself?

A. Yes.

Q. And as far as you were concerned, what was the reason for verifying?

A. Well, the main reason was that—there were two reasons. One was to avoid conflict with the Robinson-Patman Act, which we were very conscious about a violation of the Robinson-Patman Act which was price discrimination which would have been involved if we were discriminating in price among our customers in the same competing area. And the second reason was that on some occasions our customers didn't tell us the truth, and we were attempting to find out what actually was the truth.

Q. Now, in this period in 1968, from February, I think it was, when you were authorized to meet competitive situations, did you verify with competitors in every instance when you had a report up from the field?

A. You mean me?

[10,375]

Q. You or persons working under you whom you authorized?

A. No, I did not. And, certainly, not in every instance. That was a relatively rare thing.

Q. And in what situations, so far as you know, were verification calls made; when, or what reason, what infrequent occasions? You indicated it wasn't always done. Why was it done sometimes and not others?

A. Well, you have a circumstance where something entirely new and different hits you that you have not had reported from the field before and which you do not have documentary evidence of. And, on occasion, as I mentioned, where there is reason to believe that the customer may not be telling the truth.

Q. And were you aware that persons in your company responded to similar calls from your competitors in this period from 1965 to 1969?

A. Yes, I was.

Q. Did you make any verification calls yourself?

A. No.

Q. Do you have there Government Exhibit 25?

A. Yes, I do.

Q. That is a document that is already in evidence, dated December 12, 1969, from Mr. Atwell to you and to Mr. Nicely. And in it he refers to the fact that as a

[10,376]

result of advice of counsel he had stopped—no verification had been made after some time in January of 1969. The letter though is dated December 12, 1969.

A. Yes, sir.

Q. Did you receive that letter?

A. Yes, I did.

Q. Did you take any action as a result of it?

A. Yes. I suggested to the people that issued our policies and our general policy book that the section on antitrust compliance should be updated to include our January decision.

Q. Your January, 1969, decision?

A. Yes.

Q. And was your updating suggestion carried out?

A. Yes, it was. The "8" page was changed in the antitrust compliance policy. That removed the authority for verification.

Q. Now, I want to turn to certain particular changes in published price, Mr. Hayes, in which you had some involvement.

First I would like to go to the period back in December of 1965. That is the time when you were manager of the Central Region I think you called it?

not saying, "You have got my authority to spend the Celotex money"?

A. I told him this: that, if he was satisfied, from his investigation and his contact with the customer, that approximately 25 cents per hundredweight would be the equivalent of the lower prices which were being offered to other customers in that area, and, if he would make that allowance to all of the customers in that area that he was

[11,528]

going to serve that way, that it would be a legal situation under any of the Antitrust Laws that I knew anything about.

Q. By the way, where is that Hamlin, Texas, where we have the plant?

A. The Hamlin gypsum plant of Celotex is located in Fisher County, Texas, which is approximately 400 to 450 miles east of El Paso and perhaps 150 to 200 miles west of Dallas.

Q. Do you know whether Miller went ahead and authorized those unloading allowances?

A. Yes. I know he did; yes.

Q. He did. Now, were there occasions, after this advice that you gave Miller in the early '60's about the El Paso market, occasions on which you advised Mr. Miller about the Antitrust Laws and the Robinson-Patman Act?

A. Yes, sir.

Q. Well, were there many or few or—

A. Oh, several. Let's put it that way.

Q. Several?

A. Probably two or three times a month.

Q. I see. Now, please tell the Court and the jury, then, on these occasions thereafter, what advice you gave Mr. Miller about the Antitrust Laws, about compliance with the Robinson-Patman Act.

Now, you understand, we are confining ourselves to

[11,529]

the period prior to December 27, 1973, so, in that period, what advice on the Robinson-Patman Act and the Antitrust Laws did you give him?

A. Well, I told him that, under the Robinson-Patman Act, as I understood it, he could not discriminate in favor of a customer to the detriment of another customer, if they were competitors and if the merchandise was of like grade and quality, and that, unless he could find a good faith defense, as the Robinson-Patman Act calls it, to meet the equally low price of some competing manufacturer, that he had to treat all of his customers of the same class in the same trading area the same, both as to price and service and facilities, promotional allowances, or anything else.

Q. And did you advise him with respect to the Sherman Act?

A. I told him that, with respect to the Sherman Act, he could never agree with a competitor on anything, nor even discuss terms and conditions of sale or prices with competitors.

Q. Now, did you give him advice concerning this matter which has been called, here, verification?

A. Frequently.

Q. What did you tell him about that?

A. Well, I told him that, if he were confronted by a customer with a claim of a price below our price, in that

[11,530]

area, to that class of trade, for gypsum wallboard, and if he was unable, in his own mind, to establish the truth or falsity of the customer's claim by invoice from competing manufacturer, examination of the customer's books, affidavit from the customer, or other evidence which satisfied

him, then, he could, if he were so inclined, telephone a counterpart in the competing gypsum company to ascertain if, in fact, that company had offered that customer the price which the customer claimed was available to him.

Q. And did you tell him why he could do that; that is, the good faith meeting under the Robinson-Patman Act?

A. I told him that that was the only defense that was available to him to discriminate in price, facilities, or services between customers; unless he could establish the fact that he was meeting a competitive condition, that he had no choice but to forego the business or lower the price to everybody in the area, or lose it altogether.

Q. Did you caution him about the type of inquiry which, under the Robinson-Patman Act, he could make of a competitive manufacturer?

A. Yes, sir. I discussed that with him many times.

Q. What did you tell him in that respect?

A. I told him that he could call a competitor and say that the "XYZ Lumber Company in Paducah was advised that they have a price from you on half-inch wallboard of

[11,531]

such-and-such figure. Is it right or is it wrong?"

Q. Did you tell him he could accept calls from others?

A. I told him he could if he wanted to.

Q. And tell them that information?

A. As long as he confined it to answering that kind of question, I told him, it was all right.

Q. So that, now, on the one hand, you had to tell him —and did you tell him, under the Sherman Act, he couldn't get together and agree with anyone?

A. Right.

Q. In fact, you discouraged him, under what you told him, from talking to others; is that right?

A. That's right.

Q. On the other hand, you told him that he could call up and verify?

A. I tried to explain to him, many times, the difficult position that he or anybody in his capacity was put in by attempting to abide strictly to the provisions or with the provisions of those two statutes, because, in effect it is difficult to tread that narrow line between permissible, as I viewed it, and non-permissible contact, and I tried to point out to him the reason why his conversations should be so circumscribed.

Q. And those two statutes, you are referring to the Sherman Act, under which the company, Celotex, is indicted and

[11,532]

stands trial?

A. Right.

Q. And, on the other hand, the Robinson-Patman Act, which you were trying to help that company comply with?

A. Which is equally a Federal statute, the same as the Sherman Act; yes, sir.

[11,533]

By Mr. McSweeney:

Q. Did Mr. Miller ever tell you that he called some competitor and they wouldn't answer him on price verification?

A. Yes, he did.

Q. By the way—going back. When you were there in the company talking to Miller back in the early—let's say in the early '60's—when you and Mr. Miller talked, did you have this term "verification?"

A. No, sir. We called it "checking."

Q. Checking?

And this term "verification" has grown up since?

A. I have heard a lot of that.

Q. And have you seen it in the case laws?

A. Yes, I have seen it in the case law, yes, sir.

Q. By the way, if he told you that a competitor would not answer him when he called up, what did you say to him?

A. Well, I told him that the competitor didn't need to answer him, that he had his freedom of choice just the same as Miller did, and he had no recourse. If a competitor chose not to respond, why he should hang up.

Q. What could he do then about meeting the competitive price?

A. Well, then he had two choices. He could meet it and hope that the information that he already had was

[11,534]

sufficient and represented the true facts; or, he could give up the business of that particular account on that particular occasion.

Q. He always had available the lowering of price to everybody in the trade area?

A. He could always lower the price to everybody in the areas, certainly.

Q. Did you give the advice or the same type of advice you gave to Don Miller to other people in Celotex?

A. Yes, I did. To each of our product managers.

Q. Your job as a lawyer—you weren't just advising Miller on gypsum?

A. No, sir, I was not.

Mr. Fricano: Objection to going into any other products aside from gypsum wallboard.

The Court: Overruled.

By Mr. McSweeney:

Q. You had to give the company's legal advice to the product managers of other products; did you not?

A. Correct. Yes, sir.

Q. And you didn't, in that respect about complying with the Robinson-Patman Act in good faith meeting of competition, you didn't tell Miller one thing and the other people another thing; did you?

A. No, sir, I did not.

[11,535]

Q. You gave that, generally speaking, the same advice to all the product managers?

A. Correct.

Q. Now what advice, if any, about compliance with the Robinson-Patman Act and the Sherman Act did you give to the general credit manager from this period? Let's take from late '65 through 1973.

A. Well, I gave him practically the same advice that I had given to Miller. Of course, the credit man's sphere of interest is slightly different.

They were well aware of the practice in the industry of exchange of so-called ledger information, highest amount owed, length of time to pay, and whether you had to sue to collect, and whether you had to put a lien on the job to get your money, and so on and so forth.

But, the most frequent inquiry from the credit people would be with respect to an alleged claim of extended terms within which to take a discount or a greater discount.

And in those instances I told the credit manager that terms and conditions of sale, in my opinion, were a part of price, and that I gave him the same advice that I gave Miller or the other product managers with respect to the narrow limits within which I thought it was permissible for them to make inquiries of competing companies with

[11,536]

respect to extended terms or greater discounts.

Q. Now, was there a difference in the legal advice which you gave the salesmen and district office men on the one hand, and a product manager like Miller—Well, say specifically Miller, on the other hand—with respect to the compliance with the Sherman Act and the Federal Antitrust Laws?

A. Yes, sir.

Q. What was that difference?

A. I never discussed with the salesmen in the field, nor with the district branch manager, this thing that I previously referred to as this narrow exception, the so-called verification procedure.

My advice to them always was to have no contacts with competitors of any kind under any circumstances.

Q. Now, why did you make that distinction between what you covered and said with the product managers like Miller on the one hand, and the advice to the salesmen in the field and district officers on the other hand?

A. Well, there are several reasons.

The salesmen in the field, or the district managers in the field, had no authority at any time to change or alter or modify any of our published terms and conditions of sale.

Secondly, there were 12 or 15 managers in the

[11,537]

field, and possibly 150 to 200 salesmen. It was utterly impossible for me to have the same degree of frequent contact and the same opportunity to counsel and discuss and advise that I had with the half a dozen or so people around the home office with whom I was in daily or weekly contact, because we shared the same offices.

And, I could keep them more currently and more carefully informed than I could ever try to do the same with a big sales force.

Q. In other words if you talked about verification with them, were you concerned about suggesting to them that they would go right ahead and call up competitors willy-nilly?

A. I was concerned that that might occur to some of them to do it, and I didn't want them to do that under any circumstances.

Q. Whereas, you were confident that with men like Don Miller you could give him the right advice as to how to do it and he would do it under controlled circumstances?

A. I had an opportunity to tell him what I thought was proper or improper, and I could tell him that whenever it occurred to me or to him.

And frequently we would discuss the subject, yes.

Q. You knew Miller for how many years?

A. Well, the late '50's until he died in '74.

[11,538]

Q. When you gave him this advice, did he appear to you to be a person attentive to and receptive to the legal advice you gave him?

A. He was an extremely attentive audience. He was most concerned to do nothing wrong. And he would come to me sometimes with questions that I was confident he didn't need to ask, but I never discouraged him and I'd give him the best answer I could and as much time as I could find, because Miller was a very conscientious man.

Q. Now, Mr. Thompson, we had reference here to a Supreme Court case referred to as the Container Case.

Are you familiar with that case?

A. Yes, sir.

Q. And when did you first become familiar with it?

A. The first notice I had of it was when I read in either the U. S. Law Week or the C. C. H. Trade Regulations Service—and I don't recall which one, because we subscribed to both of them. I read the report of the case in the district court in North Carolina, I believe it was.

Q. And then did you follow it through the courts?

A. I followed it from then on through the Supreme Court.

Q. And then it went to the Supreme Court and a decision was rendered; is that correct?

A. Yes, sir.

[11,539]

Q. When did you learn about the Supreme Court decision?

A. Well, the decision was rendered, I think, on January 14, 1969, and I read it January 15th in the Wall Street Journal.

About a week later I got a copy of the opinion through our regular services.

Q. You subscribed to an antitrust service which reports cases?

A. Oh, yes. We had Practicing Law Institute, BNA, and CCH.

Q. The "CCH," that's the . . .

A. Commerce Clearing House Trade Regulations Service.

Q. And they report . . .

A. They report the text of opinions, yes, sir.

Q. And the Supreme Court and other courts; don't they?

A. Yes, sir.

Q. Now, going to this Container Case.

Would you say you studied that pretty carefully?

A. I have never studied any case any more thoroughly than I have the Container Case.

Q. All right.

Now, after you studied it and considered this—I am talking about the opinion of the Supreme Court.

[11,540]

A. Yes, sir.

Q. In that Container Case, what advice, if any, did you give to Mr. Miller concerning that Container Case?

A. I finally got my mind made up to the point where I told him that I didn't believe the facts of Container were identical and not very similar to the facts of the checking system that we had.

And, that I didn't believe that the Container Case forbade the practice in which he had been engaging, and I could see no particular reason why he shouldn't continue, so long as he confined himself to this narrow type of question and answer, that there was no reason that he shouldn't continue the practice if he wanted to.

Q. In other words, you told him that there was no reason from the Container Case that he had to stop verifying with competitors?

A. That's what I told him.

Q. And did you give that advice to the product managers?

A. To the other product managers in the home office, yes.

Q. In other words, this wasn't any special advice for Mr. Miller in gypsum wallboard?

A. No, it was not.

Q. And after Container, did you follow through your

[11,541]

CCH Trade Regulations, and other sources, the various opinions of the Courts construing Container?

A. Yes, I did. And I was pleased to see that such cases as came to my attention the judges had taken the same attitude I did with respect to the applicability of Container to the verification process.

[11,542]

By Mr. McSweeney:

Q. Did you so advise Mr. Miller and others?

A. I so advised Mr. Miller, yes, sir.

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[11,556]

By Mr. McSweeney:

Q. Mr. Thompson, this is, is it not, a form you used

[11,557]

or tried to use to get the customers to certify information so he could get an exception from your terms and conditions of sale?

A. That is what the 156 is, yes, sir.

Q. Had you tried this with other forms?

A. We had tried before this form was adopted to get the customer to execute an affidavit relating the details of the competitive offer which he was reporting and we found a great reluctance on the part of the customer to sign affidavits, so we devised the form which didn't require an oath.

Mr. McSweeney: Your Honor, I propose to read a portion of this exhibit, namely the first page, if I may.

Ladies and gentlemen of the jury, it is dated May 11, 1964, Bulletin No. 132. Subject: Certification of Customer's Request for Exceptions to Price or Terms of Sale.

Jerry Fisch.

Q. Where do you live, Mr. Fisch?

A. 615 Riviera Drive, Tampa, Florida.

Q. By whom are you employed?

A. Celotex Corporation.

Q. What is your job?

A. National account exacutive.

Q. During what period of time have you been employed by Celotex?

A. From August of 1967 to November of 1973, and then from March of 1975 to present.

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[11,703]

Q. Now, from time to time when you were there as Mr. Miller's assistant, what evidence did you get or receive from the field as to the fact of a—purported fact of a reported competitive situation?

A. We would sometimes get an invoice. The salesmen would obtain an invoice from the customer. Sometimes we would get the customer to sign our 156 Form. Sometimes it was just a salesman getting the name of the competitive salesman who had offered the price to a customer, and once in a while when I would travel in the field, the customer would tell me he had been offered the price and I would, on occasion, tell the salesman to initiate the 350 at that time, if he so desired.

Q. Now, Mr. Fisch, did you ever verify a report of a competitive situation with a competitor?

[11,704]

A. Yes, I did.

Q. Did you receive some instructions from someone with respect to such verification communications?

A. Yes, I did.

Q. From whom did you get such instructions?

A. Mr. Miller.

Q. What did Mr. Miller say to you or what instructions were they that he gave to you with respect to this matter?

A. He told me that he had been instructed by Dick Thompson that it was legal to verify with a competitor where a customer had already been offered a price by competition; that we were allowed to ask about a particular account and about a particular price, and that from time to time he would authorize me to make these calls, but they were to be kept to a minimum, and that I was to discuss nothing else with the competition except to ask the question and get off the phone.

But, in any case, I was not to initiate any of these calls myself and there would be very few of them made.

Q. What instructions, if any, did Mr. Miller give you about receiving any such calls?

A. He told me that I could take such calls and I was to ask, as he had previously explained to me, that I

[11,705]

was to answer specific questions about a specific account, and not to get into any general discussion.

Q. When was it, Mr. Fisch, that Mr. Miller gave you these instructions?

A. Shortly after I came to Tampa as field manager. That would be in the fall of 1969.

Q. In discussing this matter with you, did Mr. Miller tell you the purpose of these vertification calls with competitors?

A. Yes, he briefly outlined the Robinson-Patman Act as it affected our business and told me that if we inadvertently met a competitive situation that did not, in fact, exist, then we would be in violation of the Act.

Q. Did he tell you what his attitude or practice was with respect to verification calls?

A. Don felt that he liked to run his own—Don Miller felt he liked to run his own business and he did not like to make those kind of calls. He said that by the nature of the call, when you made it, you alerted your competitor to the fact you were interested in doing business with a particular account, so it was not in a good business sense the thing to do, and the only reason we did it was for legal reasons.

Q. Now did Mr. Miller, according to your observations,

[11,706]

consult from time to time with Mr. Thompson on legal matters relating to the gypsum wallboard business or the gypsum merchandising department?

A. Yes, frequently.

Q. What knowldge do you have about Mr. Miller's consultation with Mr. Thompson on such matters?

Mr. Fricano: Objection, unless it can be shown that the witness was present when such conversations occurred.

The Court: Isn't that the question?

Mr. McSweeney: I am asking him how he knows this.

Mr. Fricano: I misheard the question.

The Court: All right.

The Witness: Could you repeat the question?

By Mr. McSweeney:

Q. I will rephrase it.

You mentioned that Mr. Miller from time to time consulted with Mr. Thompson on legal matters pertaining to gypsum or the merchandising department. How do you know that? Did you observe it, or what? Tell us how you knew that.

A. Mr. Miller was very vocal about—he was very conscientious about operating within the framework of the

[11,707]

law. He would tell me he would go up to see Mr. Thompson and he would tell me when he came back down what he discussed.

[11,708]

Mr. Fricano: Objection. I move to strike. It is obviously hearsay, the conversation which Mr. Miller had with Mr. Thompson as recorded.

The Court: He hasn't said what the conversation was yet, has he?

Mr. Fricano: Whatever it was, Your Honor, wouldn't it be hearsay?

The Court: Not that there was a conversation.

The contents of the conversation would be, but so far there has been no hearsay asked for or testified to.

Mr. Fricano: Yes, Your Honor.

By Mr. McSweeney:

Q. All right. May we have the answer, please, read back as far as Mr. Fisch got.

Mrs. Wike: "Mr. Miller was vocal about—he was very conscientious about operating within the framework of the law. He would tell me when he would go up to see Mr. Thompson, and he would tell me when he came back down what he discussed."

By Mr. McSweeney:

Q. I don't know from that whether you finished or not, did you?

A. Yes, sir.

[11,709]

Q. You have finished your answer. Thank you.

Now, what if anything did Mr. Miller tell you about verifying with United States Gypsum?

A. Shortly after I came, when we discussed these types of subjects, he told me that U. S. Gypsum does not talk to us about any matter, and we do not talk to them.

Q. When you say shortly after you came, you mean shortly after you took the job as his assistant in the fall of 1969?

A. I am sorry. Yes, that is correct.

Q. Now, did you in your experience as an assistant to Mr. Miller encounter Form 350 requests where they reported competition with Georgia-Pacific?

A. Yes, I did.

Q. How did you respond to the competition of Georgia-Pacific?

A. There was a particular problem with Georgia-Pacific in that their warehouse operations had become prominent, I would think, just about the time that I had come to Tampa as field manager for gypsum. The warehouse operations ran specials sometimes on a daily or a weekly basis, sometimes on a monthly basis. But they would occasionally sell pallets of gypsum wallboard, 50 pieces of board, for the price we would be selling a truckload of gypsum for, which made it very difficult, if not

it can cost the company a lot of money, and you can lose your job."

When it comes to the Sherman Act, we went through that with the key thing being that you cannot agree with a competitor, that you cannot only cost the company a lot of money and lose your job, but you can go to jail. And that stuck with me.

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[12,680]

Q. Has there ever been any question in your mind, Mr. Watt, throughout this entire period of time from 1938 until the present day that it was illegal to fix prices or agree with competitors on prices that were going to be charged for the product?

A. There has never been a question in my mind regarding that.

Q. Mr. Watt, there has been testimony in this trial regarding price verifications. Did you have occasion to personally verify prices at any time after you came back with U. S. Gypsum in February, 1962?

A. Yes, I did.

Q. Now, why did you do that, Mr. Watt?

A. Well——

Q. What was your purpose? Excuse me.

A. Two reasons. It had been explained to me without any question that if I had a request, a recommendation from the field organization for a price, to meet a competitive price, and that in order to comply with the good faith section or the good faith defense of the Robinson-Patman Act that it was completely legal for me to seek that information where I could get it, and, properly handled, I could ask competitors what their price was. So I did it for that reason.

[12,681]

The second reason is that I had been in sales and marketing and I had a lot of different capacities during my experience. And I was aware that buyers did mislead sellers occasionally. And so I verified to prevent being misled by somebody that was perhaps stretching the truth.

Q. Did you, Mr. Watt, ever have any understanding or agreement with any competitor to verify?

A. No, sir, I did not.

Q. Did you have any understanding or feeling that you were obliged or committed to answer any such inquiries which might come from a competitor?

A. No, I had no obligatory need to do it. It was my choice. That is why I felt it was not an agreement.

Q. You testified a moment ago, I believe, that you were advised by counsel regarding the verification practice. Did the lawyers ever tell you the basis for verification?

A. Yes, to——

Q. What—excuse me.

A. To prevent discrimination under the Robinson-Patman Act.

Q. In any of these verification contacts, Mr. Watt, did you ever refer to or discuss the future prices of either U. S. Gypsum or the particular competitor you were talking to?

A. No, sir, I did not.

[12,682]

Q. Now, during what period of time did you personally verify with competitors?

A. Oh, I verified in 1962 because there wasn't much of it then. I mean, there wasn't as much need for it.

In '63 I know I did some verifying.

Now I am going to make mine.

I am slowly gaining the impression that by the massive questioning concerning pre-statutory period, the just absolutely massive and gross detailed questioning, we are approaching the point where you are going to deprive these defendants of a fair trial.

If you persist in that, I am going to dismiss this

[12,989]

indictment.

Now, that's my impression, so let's not have any misunderstanding about it. By the very broad and massive questioning as to '61, '62, '63, '64, and nothing within the statutory period, I am gaining the impression that we are risking, we are approaching the point of risking that.

So, you be advised now as to my statement.

We will recess for ten minutes.

(Recess taken.)

[12,990]

The Court: Proceed.

By Mr. Fricano:

Q. Now, with respect to the period of 1969 through 1973, did you from time to time over the telephone and face-to-face talk to competitors with whom you were checking prices prior to that time?

A. Between those periods I had conversations with competitors; that is correct. I went to meetings, and I called them on some things; that is correct.

Q. All right, sir.

Now, yesterday you testified at page 12,876 of the transcript as follows:

A. That was in charge of sales. It was to replace a Mr. Hilding who had been killed in a fire, and I stayed—this was in charge of sales east, which still was only the 37 eastern states. And it was dealer sales. It didn't include paint sales, commercial trade sales, industrial sales.

Q. When you say dealer sales, would that be sales of gypsum wallboard to dealers?

A. Yes, that was. All of our sales that I had charge of were primarily to dealers.

Q. All right. And then were there any changes since

[12,998]

that time? You say you became a corporate vice president for sales in 1964. Have you held that job since then?

A. I haven't held the corporate job of a vice president because we became divisionalized somewhere in '65 or '66, and at that time I was appointed vice president of the Building Products Division.

Q. Did that include gypsum wallboard sales, Mr. Nicely?

A. Yes, and at that time I did not stand for the reelection of vice president of the corporation.

I might say that in April of 1965 I was given the entire responsibility of sales for the Building Products Division.

[12,999]

By Mr. Warnke:

Q. That is entire responsibility in terms of geographical coverage, is that correct?

A. In terms of geographical coverage and also in terms of all products of the Building Products Division.

Q. I see.

Would there have been any changes subsequent to that time or have you continued in that same capacity?

A. 1973.

Q. —1973, Mr. Nicely.

A. Okay.

Theoretically sales should never have, in my opinion, sales, as we are constituted, in my opinion should not have authority over pricing policy. It puts the Sales Department in a position where they might exercise more authority on price and the downward trend to sell merchandise than they should.

Q. They tend to lower prices in order to increase volume, is that correct?

A. It could be said if you had the wrong person as head of sales, and the pressure was on him to create sales, he could exercise authority that should not be exercised.

Q. All right.

How about the pricing responsibility? How has that been exercised during your service with National Gypsum?

A. Are you speaking of day-to-day prices?

Q. Yes, in terms of deciding whether or not to increase list prices, has that been exercised by the sales people, or has it been exercised by some other office?

[13,004]

A. Well, it has been exercised, I would say, in most part by other offices.

In my consultations with Mr. Hayes and prior to Mr. Hayes with the pricing committee, we would make recommendations and I suppose the final authority would at that time, would rest with the Chairman. I think he has accepted our recommendations in most cases.

Q. In your function in connection with sales, have you concerned yourself directly with costs?

A. No.

Q. And the others who have been involved with principally the pricing function, have they involved themselves with costs?

A. Oh, yes.

Q. And that has been part of the input in their decision-making process?

A. Oh, yes.

Q. You have testified, Mr. Nicely, that in the period of time from—well, really from your beginning of service with National Gypsum in sales until December 27, 1973, that you spent around 60 percent of your time in the field, is that correct?

A. That is correct.

Q. When you went into the field, what did you do?

A. Well, I called on customers. That was my primary

[13,005]

reason for going to the field. I suppose the secondary reason was to evaluate the sales personnel, to look at the salesmen, to look at the managers, to look at our facilities, to determine whether or not we had ample facilities, whether we had enough salesmen or whether we had too many salesmen.

But my primary function was really to get an order.

Q. In that connection, you say you called on customers?

A. Yes.

Q. Would these be dealers that you called on?

A. Well, I called on dealers primarily, but I also called on contractors and I called on architects and I called on any factor that would have to do with the material, buying material from us. It could be a builder.

Q. And did you limit your calls on dealers to the large dealers or did you try to cover some sort of spectrum?

A. No, I suppose I called on as many small dealers as I did large dealers.

A. No, it didn't.

Q. Or Tuesday or Wednesday?

A. No, sir, it didn't.

Q. What day did it take place?

A. It took place on Thursday.

Q. Now, was Groves Lumber Company the only call you made on Thursday, or was it one of a group of calls?

A. Groves was just a routine call. I recall that, at that time, we had a—we had a salesman by the name of Mr. McPherson, and I guess the reason I remember Mr. McPherson is I had looked at Mr. McPherson with the thought of promoting him to an assistant district manager, but, prior to my going to Dallas, Mr. McPherson resigned to take another job, take a job with one of our dealers, so I spent most of

[13,014]

my time, or at least that Thursday and probably Friday, calling on Mr. McPherson's accounts, in the presence of or with our assistant district manager.

Q. And was Groves Lumber Company one of Mr. McPherson's accounts?

A. Yes, it was.

Q. Now, prior to going to Dallas and prior to calling on Groves Lumber Company, had you discussed with any of your competitors anything to do with the competition of the Texas Gypsum Company?

A. No, I hadn't.

Q. Had you encountered any competition from the Texas Gypsum Company prior to going to Texas in March of 1962?

A. No, I hadn't.

Q. To the best of your knowledge, was Texas Gypsum Company delivering into Dallas, prior to anything

that you learned when you made this trip in March of 1962?

A. I think probably the first time I got involved with Texas Gypsum Company, our competitive situation would have been at Groves Lumber Company.

Q. And had you known, before this Dallas trip, that Texas Gypsum Company was selling to Groves Lumber Company?

A. No, I didn't.

Q. Now, you said you had no responsibility for the

[13,015]

El Paso area at that time; is that correct?

A. That's right.

Q. And Texas Gypsum Company, I take it, was located in El Paso at that time, to the best of your knowledge?

A. Well, to the best of my knowledge, it was. I had heard very little of Texas Gypsum Company. I suppose, outside of reading in the paper that someone had sent me, that they couldn't have existed, as far as my territory was concerned, and that they—and I think you heard the testimony here that their primary marketing area was in the El Paso area, the Albuquerque, New Mexico area, of which I had no control over whatsoever.

Q. I see. Now, you say you went to Dallas because of sales problems and because of management problems. What was the purpose of your calling on Groves Lumber Company when you went to Dallas?

A. To get an order.

Q. And did you ask for an order?

A. Yes, I did.

Q. Had you called on a number of other dealers in Texas, or was Groves a unique example of your calling on a dealer?

A. No, I had called on dealers all week.

Q. And was Groves the smallest dealer you had called on

[13,016]

or the largest or intermediate, or what?

A. I don't think it was the smallest. In fact, the call immediately after that, Groves, was Sherwin-Williams, a little paint store, so I think it would have been smaller than Groves. There are many small dealers in Dallas. There were a dozen small dealers in Dallas.

Q. You seem, Mr. Nicely, to have a very vivid recollection of this call. Did you have any reason to focus on that, what occurred on a——

A. Since 1962, I haven't had a chance to forget the call. There have been other matters that came up. This has been brought to my attention, but I don't think I would have forgotten Groves Lumber Company call, anyway, because there are certain things you do in the run of the year that you remember. There are certain things you don't remember.

Q. And you——

A. And it——

Q. And you, of course, were present here in court when Mr. Tinsley testified with respect to that call?

A. That is correct. Yes, I was.

Q. And have you had occasion, since then, to refresh your recollection as to what occurred? Have you checked any records?

A. Well, I have read one document. Yes.

[13,017]

Mr. Warnke: Mr. Grainer, might the witness have Defendant Nicely Exhibit 1?

By Mr. Warnke:

Q. You are familiar with this document which is in evidence, Mr. Nicely; is that correct?

A. Yes, I am.

Q. And that is a sworn statement that was given by you at one time as to what occurred with Groves Lumber Company?

A. Yes, sir.

Q. Does that accurately reflect your recollection of what occurred?

A. Yes, it does.

Q. Pertaining to the substance of the discussion back in March 1962, you say you asked Mr. Tinsley for an order. Was Mr. Tinsley the buyer for Groves Lumber Company?

A. I think Mr. Tinsley was the manager of Groves Lumber Company. As I recall, Groves Lumber Company was owned by—maybe by Mrs. Groves. But, he was the only person I talked to. I persume he was the manager.

Q. And what inducements did you offer to Mr. Tinsley to buy from you, give you an order?

A. Well, I offered the inducement of buying a top-notch product. I certainly didn't give him any price inducement.

[13,018]

Q. Did you offer to sell him at any kind of a discount in price?

A. No, I didn't.

Q. Did you offer him any sort of an unloading allowance?

A. No, I didn't.

Q. Did he tell you who he was buying from at that point?

A. Yes. He told me was buying from Texas Gypsum Company. He had bought some from Texas Gypsum Company.

Q. Did he tell you how delivery was made by Texas Gypsum Company?

A. Yes, he did.

Q. And what means of delivery did he say existed?

A. By truck.

Q. Did he ask you to give him truck delivery?

A. Oh, I don't know that he asked us to give him truck delivery. He asked what our policy was, and I told him what our policy was.

Q. And what was that, Mr. Nicely?

A. Well, at that time in that area our policy was to deliver by rail to the dealer's private siding, or to the nearest team track to the dealer's place of business.

Q. And did you offer to make any kind of a deviation from that policy for Groves Lumber Company?

A. No, I didn't.

[13,019]

Q. Now, can you recount what, if anything, Mr. Tinsley said to you about his reasons for not giving you an order?

A. No. I recall a couple of questions he asked me.

Q. What were those, Mr. Nicely?

A. The first thing he hit me with—And I might say Mr. Tinsley was a little belligerent that day. I had done nothing to him. He was a little belligerent. He wanted to know why all the big gypsum companies were jumping on Texas Gypsum Company.

Q. What did you say in response to that question?

A. I said that I had no knowledge of that; but as far as National Gypsum Company was concerned, we were not jumping on Texas Gypsum Company. I said, "In

fact, we are not even meeting Texas Gypsum Company here."

And, in meeting, I am speaking of trucking.

Q. And did he challenge that statement?

A. No. Then he got into other companies, and he said, "Well, why is U. S. G. jumping on them?"

And I said, "I have no idea of U. S. G.'s action toward Texas Gypsum Company. But, I suppose that if they are cutting prices and doing what you say, jumping on them, I suppose that they have no intention of letting Texas Gypsum Company or any other company take their business without a fight."

[13,020]

Q. Now, had you had any talks with U. S. Gypsum Company, or any other gypsum supplier, with regard to their policies in Texas?

A. No, I had not.

Q. This was just an opinion on your part in response to Mr. Tinsley's question?

A. Purely an opinion.

Q. Now, there was a reference made by Mr. Tinsley in his testimony to a comment that you allegedly made with regard to a policy of containment. Do you remember using those terms, "a policy of containment?"

A. No, I don't recall using those terms. It doesn't sound like my language. But if I'd have used them, it certainly wouldn't have been any containment that I had entered into an agreement with anyone else to contain them.

Q. Did National Gypsum Company have any policy of containment of Texas Gypsum Company in March of 1962 in Dallas?

A. No.

Q. Or anyplace else?

A. No.

Q. Now, he referred—I am speaking of Mr. Tinsley. He referred to comments about what they were doing with respect to meeting Texas Gypsum Company's competition.

How do you refer to a competitor such as the

[13,021]

United States Gypsum Company? Do you call it "he," "she," or "it?"

A. Well, I think I remember what I just said. If United States Gypsum Company was doing any of these things, that they had no intention of letting anyone take their business, so I think I would refer to them as "they." I think I'd refer to us probably as "we" or "us."

Q. So as far as you are concerned the competition is "they" and you are "we?"

A. That's right.

Q. Prior to this conversation you have testified that you had no knowledge of what U. S. Gypsum Company might be doing in Texas; is that correct?

A. None whatsoever.

Q. And anything you learned about that would have come from Mr. Tinsley?

A. Well, it would have come from Mr. Tinsley or some other dealer I called on. Had they been doing something that I—I recall no other. I recall no other talk about Texas Gypsum Company except from Mr. Tinsley.

Q. Did you encounter Texas Gypsum Company's competition with any of the other dealers that you called on in March of 1962 in Dallas?

A. Not that I recall, no.

Q. Let me turn now, Mr. Nicely, to the question of

[13,022]

verification of lower competitive prices and credit terms by calls to competitors.

You, of course, have been here throughout the course of this trial, and you hav heard a certain amount of testimony with respect to that; is that correct?

A. Yes, it is.

Q. And would you describe for us what connection you had with the practice of verifying lower competitive offers with competitors during the period of time in which the testimony indicates National Gypsum Company authorized some of its employees to engage in those calls? What was your connection with it?

A. Well, I had no direct connection. I never made a call to a competitor. I never received a call from a competitor. I never talked to a competitor about verification of a price. I had no direct connection with verification.

Q. When you became Director of Sales in 1964, and then Vice-President of Sales first for the East in '64, and then country-wide in '65, was the procedure of verification then going on, or did it stop during that period?

A. No. When I became Director of Sales in '60, I had never heard of the term "verification of sales." And I had never heard of verification of sales.

Q. So you heard about it when you first came to Buffalo

[13,023]

in 1960; is that correct?

A. Well, I wouldn't want to say that I heard about it when I first came to Buffalo.

Q. What would you say then?

A. I don't know when I first heard of it. I know that when I became Vice-President and had the responsibility for Mr. Atwell direct—he was my subordinate—that I knew he was making verification calls.

When he started, or when verification started in our company, I have no idea.

Q. Did you ever give Mr. Atwell or anybody else instructions with regard to verification of prices with competitors?

A. Not to make verification calls I never gave him instructions, no.

Q. Did you give him any instructions with respect to procedures to follow in making verifications?

A. No, I didn't.

Q. Do you know whether at that time, or at subsequent times, there was any sort of a statement, a company policy, with respect to verification?

A. Well, I believe sometime in—and there has been a document shown here—sometime in 1967 Mr. Wagner—who I believe was Vice-President of Administration—wrote a policy on this.

[13,024]

Mr. Warnke: Mr. Grainer, might the witness have Defendant National Gypsum Exhibit 77.

By Mr. Warnke:

Q. And while they are getting that—I gather, Mr. Nicely, that you are referring to a document on antitrust law compliance?

A. Yes.

Q. Which was issued over the signature of Mr. Wagner in 1967?

A. Yes. 12/1/67.

Q. Right.

And in that connection I refer you to page 8 and ask that you take a look at the right-hand column and tell me if that's what you mean by the company policy with respect to the verification of prices with competitors?

Q. And did that have anything to do with verification of what a competitor might be doing in the future?

A. No. Not whatsoever.

Q. Was it limited strictly to existing offers or past prices?

A. Yes.

Q. Now, when you learned about verification, did you acquire an understanding of why it was that the National Gypsum Company occasionally verified lower competitive prices as reported by customers?

A. Yes, I did.

[13,028]

By Mr. Warnke:

Q. What was your understanding of the reasons for these verification calls?

A. Well, I think there were two basic reasons sort of tied together. One was to assure us of a compliance with the Robinson-Patman Act. And the other was to prevent us from discriminating among our customers which might be brought about by, except as a fact, information which we received from our sales department which they had received from customers.

Q. Was it your understanding that this practice of verification and the procedures followed were checked out with legal counsel, or was this done without legal advice?

A. Well, I understand it was checked out with legal counsel.

Q. And was it your understanding that these verification calls occurred normally when you had a report of a lower competitive price from a customer, or were they the exception?

Mr. Fricano: Objection, Your Honor. Mr. Warnke has asked a series of questions now as to this

man's understanding of the practices which he wasn't even engaged in he said.

The Court: Sustained.

[13,029]

By Mr. Warnke:

Q. With respect to the practice of verification, I would like you to take a look at Government Exhibits 29 and 30-A.

Mr. Warnke: May the witness have those, Mr. Grainer.

(Exhibits are handed to the witness by Mr. Grainer.)

By Mr. Warnke:

Q. Do you have those documents, Mr. Nicely?

A. Yes, I have. Each one of these is a separate page.

Q. Do you have the exhibit marked Government Exhibit 29?

A. Yes, I have.

Q. And also the Government Exhibit 30-A?

A. I have it. I haven't looked at it.

Q. Would you take a look at it just to familiarize yourself with it.

A. Yes.

Q. Government Exhibit 29, which has been testified with respect to, has been identified as certain talking notes that were used by Mr. Atwell in October of 1968, and Government Exhibit 30-A indicates that these talking notes were used apparently in a meeting with a Mr. Gerber.

[13,030]

Who is Mr. Gerber?

A. Mr. Gerber at that time was vice president of sales East.

Q. But you have no recollection of being in attendance when Mr. Atwell made these comments?

A. No, I haven't.

Q. Referring to the last page of Government Exhibit 29, which are the notes used by Atwell, there is a reference to Mr. Gustavus, and to the fact that Mr. Gustavus was given the type of authority now being given to you.

Do you know what the type of authority was that was given to Mr. Gustavus?

Mr. Fricano: Objection, Your Honor. The man said he wasn't at the meeting that Mr. Atwell gave these notes at, and he has never seen the document before. Now, he is being asked about an individual who is identified here, a Mr. Gustavus, and what the situation was.

Mr. Warnke: I believe, Your Honor, I have asked whether he knows what authority was given to Mr. Gustavus, which would have been referred to in these talking papers.

The Court: If he knows of his own knowledge, he can answer.

Mr. Warnke: Might the witness see NG 385?

The Court: He has not answered yet.

[13,039]

Mr. Warnke: I would like to have him see that.

The Court: Oh.

By Mr. Warnke:

Q. Mr. Nicely, Defendant National Gypsum Exhibit 385, which is in evidence, is a memorandum to you from Mr. Atwell, dated March 19, 1968. What it says is that "This is just to reduce to writing the authority you and I gave Mr. Gustavus on gypsum during our last trip to the west coast on February 28th," and it goes on to describe authority, as I understand it, given to Mr. Gustavus, to meet certain competition.

Is that correct?

A. Yes, that is what it is.

Q. And does this authority include any sort of authority to verify prices with competitors?

A. No, it doesn't.

Q. Is it your understanding that this is the authority that was given to Mr. Gustavus in 1968, to which Mr. Atwell's notes would have referred?

A. Yes, it is.

Q. Did the time come, Mr. Nicely, at which the verification of competitive prices with competitors was stopped by the National Gypsum Company?

A. Yes, the time came that we stopped it.

Q. When was that time, Mr. Nicely, to the best of your

[13,040]

knowledge?

A. That was in mid-January of 1969.

[13,041]

By Mr. Warnke:

Q. And did you have anything to do, any role to play in the stopping of this verification practice?

A. Yes, I—on January 21, 1969, I called Mr. Atwell from Denver, Colorado. I was in Denver, Colorado on a sales trip and I told Mr. Atwell that I had read of the Container decision, and I suggested that he cease verification calls. I don't recall whether I found out then or later that he had already had that same advice from counsel.

Q. All right.

Now you say that you read of some case in a newspaper and then called Mr. Atwell, is that correct?

A. I read of the decision in the Container case, yes, the Supreme Court decision in the Container case.

Q. Do you know whether calls to competitors had been made to verify prices in January, 1969?

A. I don't know.

Q. Do you know if any were made after December 27, of 1968?

A. I don't know.

Q. Was it your understanding that the Container case necessarily made the verification calls of National Gypsum Company illegal?

A. No, but—what I read gave me enough concern

[13,042]

that I thought that I should suggest that we cease verification.

Mr. Warnke: Mr. Grainer, might the witness have Government Exhibit 25.

By Mr. Warnke:

Q. While he is getting that, I will describe it to you, Mr. Nicely. That is a memorandum which has been admitted into evidence, and as to which there has been testimony. It is a letter dated December 12, 1969 from

Q. And your answer was that you had no information prior to going to Dallas?

A. That's right, I had no information.

Q. Thank you.

Finally, with respect to verification.

You testified, as I understand it, that you only knew of Ken Atwell making verification calls to competitors to check on lower competitive prices; is that correct?

A. That's correct.

[13,049]

Q. And were you here at the time that Mr. Kroth testified?

A. Yes, I was.

Q. Had you known prior to that that Mr. Kroth had done any verifying?

A. No, I had not.

Q. And were you here when he testified that you had asked him to make verification calls?

A. Yes, I was.

Q. And was that, as far as you are concerned, a mistake on his part; or how would you characterize it?

A. I think it was a mistake. I think he must have mixed it up with something else, because I have no recollection of ever asking Mr. Kroth or Mr. Webster, or Mr. Atwell or anyone else, to make a verification call for me. It is highly inconceivable that I would have needed anyone to have made one for me, because I can't think of anyone who would have called me. And I am thinking of our people asking me to verify something with a competitor.

Q. Prior to going on one of your field trips, Mr. Nicely, did you ever ask someone in Mr. Atwell's office what the competitive situation was in the district to which you were going?

A. Oh, I think I have done that. That's almost normal procedure as you start out on a trip. You might

[13,050]

pass by and say, "I am going to Dallas." Or, "I am going to Boston. Is there anything I should know about the market?"

And that's just normal procedure.

Q. But you did not ask if they verify with any competitor?

A. No, I did not.

Q. With respect to your contacts with competitors, Mr. Nicely, would you indicate what circumstances there might have been in which you might have found yourself in the company of competitors?

A. Well, at National Home Builders, at the Retail Lumber Dealers.

Q. Would these be customers' trade shows or conventions, or meetings of some sort?

A. Yes, they would be.

Q. And at those occasions, did you have conversations with your competitors about prices of gypsum wallboard?

A. No, I didn't.

Q. What other occasions would you have had to meet competitors?

A. Well, other trade shows, other than the two I mentioned. The plasterers meetings, and the drywall meetings. I know of no others. And I think the total sum of my conversation with any competitors at those meetings

[13,051]

would have been confined to, "Hello." And, "How are you?" and, "Nice to see you." and just a general greeting.

Q. Did you have anything to do with intra-industry sales? Did you have anything to do, for example, with the sale of paper to the competitors, the purchase of products from competitors?

A. Yes, I had that responsibility, and I still have that.

Q. And with what competitors would you have had some degree of contact in connection with intra-industry sales?

A. Well, specifically I made one call on American Gypsum. I made a call—had a meeting with Mr. Dierks on one occasion. And, I guess, one call on Grand Rapids. But that was just last year, so actually two calls only in the time we are talking about.

Q. Did you make any sales to United States Gypsum, or did you buy any products from United States Gypsum? When I say "you," I mean "National Gypsum.

A. Yes. We bought some products of United States Gypsum Company. We bought for quite a time Imperial Stucco. And I think we bought some spark tape. And we might have bought the gypsum board at one time, certain cases.

Q. In the course of any meeting that you might have had with a competitor or competitor's employee with respect

[13,052]

to the purchase of products or the sale of products, did you discuss with any of them at any time the prices of gypsum wallboard?

A. No, I did not.

Q. Did you ever attend a meeting of the Gypsum Association, Mr. Nicely?

A. Not—I wouldn't call it a meeting. I attended a social function in either 1954 or '55. I was invited to dinner.

Q. Well, I don't think we are interested in anything that goes back to 1954 and 1955.

A. That's my total involvement in the Gypsum Association.

Q. I see.

And that was a dinner?

A. Yes.

Q. You never attended a Gypsum Association committee meeting?

A. No, sir.

Q. Did you ever receive any reports on the Gypsum Association meetings?

A. No, sir.

Q. On any occasion, Mr. Nicely, did you ever receive from any competitor any information of any kind as to the competitor's intentions with respect to prices or with respect

[13,053]

to terms and conditions of sale?

A. No, sir.

Q. Did you ever discuss with any competitor what National's plans might be with respect either to prices or terms and conditions of sale?

A. No, sir.

Q. Did you ever receive any advance word from any source as to price action that would be taken by a competitor before that price action had been published to the field?

A. No, sir.

Q. And that would be true with respect to the price change of December 15, 1965, you received no advance word of any sort?

Mr. Fricano: All right, sir, I will ask Mr. Barber.

By Mr. Fricano:

Q. My question again, sir, is with respect to Mr. Barber, not Mr. Atwell.

Under your antitrust compliance policy, was it permissible for Mr. Barber, your General Credit Manager, to contact United States Gypsum, and vice versa, and ascertain information relating to entire zones where there were

[13,079]

numerous customers?

A. I don't know whether you understand it. I had no authority over credit whatsoever.

Q. Sir, isn't that your signature?

A. Yes, it is.

Q. Well, if you had no authority, why is it that your approval is on here?

A. Well, maybe I should explain what my approval means on a credit document.

Theoretically, I approved of this. Many things I have approved on documents similar to this has not been approved with the credit department. It is certainly normal of the credit department to keep me advised of what was going on with the credit department, and certain things I would approve of it would not be put into effect, and vice versa. I have disapproved things which the credit department approved of.

And, normally if they related to sales, they would not be approved of by the credit department.

Q. I guess I am confused again, sir.

You mean when you sign off on a document like this, giving your approval to make your billing date the same as United States Gypsum, that doesn't mean it is your approval?

A. I approve of it, yes, but that doesn't mean that the credit department will approve it. I had no authority

[13,080]

over terms. I had no authority over many things. But, many things were brought to my attention and I approved of those things. But that didn't mean that they would be approved subsequently.

Q. All right, sir.

Well, let's look at 983, if you will please. 983 is dated January 22, 1968. Here again it is from the regional credit man, R. J. Kramer, and it is directed to E. E. Williams, to you, and Mr. Barber, the General Credit Manager.

And it states:

> "Grace period extension, the Monday following if 25th falls on a Saturday or Sunday. 2 percent cash discount only. Customer. G. L. Wright, and so forth."

And again Mr. Barber signs with his approval and you sign with your approval.

Now, the back-up documents for this approval show that the first contact with respect to this customer was on March 8, 1967, when a Mr. Griffith wrote to the credit file as follows:

> "On March 6, 1967, I phoned Mr. Sabel of U. S. G. He told me that they do not base their grace period on working days, they base it on number of calendar days, which is 5. But if the 25th comes on a

[13,081]

> Saturday or Sunday, then the grace period is extended to the following Monday. Sabel said that this has always been their practice for all accounts."

A. Quite a while, probably 18 or 20 years. I don't recall.

Q. When he left National Gypsum, did he leave with good relations between officials of the company and himself?

A. I think so. Yes, I know when he left I spent probably a half a day with Mr. Kroth upon him leaving trying to point out that he shouldn't leave because he was a valued employee, and we certainly discussed what his future was going to be. I advised him against leaving

[13,092]

because at that time he had been with us so long and he had created such a nice retirement fund that he could not possibly equalize it with his remaining years of work; however, he did leave us just the same.

[13,093]

By Mr. Fricano:

Q. He was a valued employee?

A. Oh, yes, he was a valued employee.

Q. And this valued employee took the witness stand and stated without hesitation or qualification, from time to time you instructed him to make such verification calls, is that not correct?

A. I don't exactly recall his testimony. I have not read it since. But I do recall him saying that I had instructed him to. I was amazed he said that and I was amazed that he had been making any verification calls.

Q. Did you also know at this time, on or about this time, that Mr. Webster, who also worked for Mr. Atwell, was making and receiving such telephone calls?

A. No, I did not. Both were surprises to me.

Q. When Mr. Atwell wrote his December, 1969 memorandum, which is in evidence, which was referred to this

terms or variations on prices, because Mr. Fricano referred to both, and the memorandum he just read refers to variations on prices.

By Mr. Fricano:

Q. For how long a period of time, sir, after May 24, 1967, did the National Gypsum Company continue its policy of not deviating from its published list price?

A. I think you could say that that lasted until Mr. Hayes was made vice president of merchandising operations, which would have been early in 1968.

Q. Thereafter, did National, from time to time, give a discount in the marketplace?

A. After January 1, or somewhere in early 1968, yes, I think we gave some. I think we met some competition.

Q. Were prices reasonably stable in the marketplace, from your standpoint, at least, up until September, 1968?

A. No, sir.

The Court: Perhaps I am the only one that is confused on this, Mr. Nicely, but I want to ask you this.

In the period December 27, 1968, through December

[13,103]

27, 1973, Mr. Colon Brown was Chairman of the Board; is that right?

The Witness: Yes, sir.

The Court: Who was next in line to him in the corporation?

The Witness: Well, it is—'73, I think we had a president in there for two years—Mr. Tucker, and then, after that, was Mr. Hayes.

The Court: All right. Now, where did you fit in?

The Witness: I fitted down below Mr. Hayes. I was at the fourth level.

The Court: You were at the fourth level?

The Witness: Yes. Mr. Brown, Mr. Tucker, Mr. Hayes, and then I came in.

The Court: All right.

By Mr. Fricano:

Q. Now, with respect to the information which was given over the telephone to Mr. Jack Hayes in November of 1965—

The Court: By whom?

By Mr. Fricano:

Q. —by Mr. Wright, who was their Chicago—I think regional sales manager——

[13,104]

A. He was division manager.

Q. Division manager?

A. Yes.

Q. What did Mr. Hayes tell you about that?

A. Well, I can't remember the exact words, but I think I can remember them fairly well.

Some time during the day, he told me that he had received a call from Mr. Wright, and that Mr. Wright told him that he had seen an announcement of USG's, announcing a price change. It was the one that would be effective December 15, 1965.

[13,105]

By Mr. Fricano:

Q. Did he also tell you that Mr. Wright called ~~him~~—"him" being Mr. Hayes—from Milwaukee, Wisconsin?

A. I think I so testified to that in a—maybe in a deposition or something.

Q. Was it true then, and is it true today?

A. Well I was—To the best of my recollection at that time, yes.

Q. Now, did you participate in decisions in November 1965 with respect to the change in prices on December 15, 1965?

A. Yes, I did.

Q. Was it a joint decision between you and Mr. Colon Brown with respect to that price change?

A. I don't think you could confine it just to me and Mr. Colon Brown. I think there were several people. I think Mr. Atwell was in it. Mr. Manske was in on it. Maybe at one time Mr. John Brown was in on it. And Mr. Colon Brown. I think there were several people.

Q. Would that also be true with respect to the credit change?

A. What credit change?

Q. I am sorry, sir. The change in terms and conditions of sale that were made effective by National Gypsum on March 1, 1966.

[13,106]

A. I don't recall who all was in on that. I know we discussed it, and it was an on-going discussion on some of those things, and I really don't know who made that decision. That was in the credit department or in the treasury department. It didn't come directly under me, and I really don't know who all was in on that discussion.

Q. Is it your testimony then that you did not participate in that?

A. Oh, no, that's not my testimony. I did discuss it, and I was—I guess part of the decision, probably some of the input I had. I don't know whether I was present at the time the decision was made, but I am sure that some of the input I had was used.

Q. All right, sir. Now with respect to your travels, you say that you spent 60 per cent of your time approximately between 1965 through 1973 on the road traveling?

A. I think that's a good close approximation, yes. The reason I say that, I just happened to look at 1962, and I think I looked at the '69 expense reports. And, I believe that if you check those you'd find that I made in 1962 about 33 or 35 trips out.

Now, they are not all weekly trips, but some of them were two-week trips. But I made 35 trips out. And, prior to '62 I probably made more than that. I was out most of the time.

[13,107]

Q. All right, sir. Now, while you were on your trips, did you learn of certain competitive situations in the markets that you visited?

A. Oh, I am sure I did.

Q. Now, when you returned from these trips, did you ever tell Mr. Atwell concerning these situations?

A. I have no recollection of telling Mr. Atwell. I normally wouldn't have done that. It would have been highly unusual for me to have done that.

[13,108]

By Mr. Fricano:

Q. Why?

A. Well, the flow of communications wasn't from me to Mr. Atwell. Certainly if we had a district manager worth his salt, Mr. Atwell would have known about it long before I got back. I wasn't in a habit of going to Mr. Atwell and making a report on my calls.

So, under a normal situation, I would not have reported to Mr. Atwell.

Q. Please forgive me, I didn't mean to suggest that you were making a report to Mr. Atwell.

Well, was there any way, or did you instruct your divisional manager, the man in the marketplace, to make sure that Mr. Atwell got the information?

A. Well, they had those instructions, I suppose, from me at one time or the other. Maybe more than once. But they also had those instructions from their immediate superior.

Q. And this type of information which you uncovered in the marketplace pursuant to going from dealer to dealer—as you have testified you did—that kind of information would be the kind of information that Mr. Atwell would need and use in the job that he was performing; is that not true?

A. Well, I don't think I testified that I uncovered

[13,109]

a lot of information in the marketplace, and I am not sure I uncovered anything new that Mr. Atwell didn't already have.

I am sure that I must have run across some competitive situations and discussed it with the customers in the marketplace. But I might say that it was up to the salesman to take that information to—if it was new information, to take that information to the district manager.

And for the district manager, they had certain lines of communication. It wasn't up to me. And I might have

gone out the next week and forgot to have told Mr. Atwell, so I am sure he didn't depend upon me to bring it.

Q. Now, sir, did Mr. Atwell from time to time discuss with you competitive problems that he had uncovered through his subordinates in the marketplace?

A. Oh, I am sure he must have discussed, in the normal course of business, competitive situations with me. I can't recall a specific one, but I am sure that it would be highly unlikely that they didn't discuss some with me.

Q. And finally, sir, are you able to identify——

Mr. Fricano: May he have 501, 502, and 503. I am sorry, 500 through 503. I am off on that.

Mr. Warnke: May I ask, Your Honor, are these GX exhibits?

Mr. Fricano: Government exhibits, Your Honor, yes.

[13,110]

Mr. Warnke: 500 through 503?

Mr. Fricano: 500, 501 through 503, Your Honor. I am sorry, 500, 501, and 502.

By Mr. Fricano:

Q. These have been displayed before on bigger charts, as you probably saw, Mr. Nicely. We won't bring those out now. They are all entitled "Plan of Action Relating to the December 15, 1965 Price Increase."

Can you identify as having seen any one of these three at or about the time when they were prepared?

A. I can testify without any doubt that I saw 501 on the 17th of November, and that I was personally responsible for the GX Exhibit 500 and 502.

Q. You prepared those?

A. Yes, I did. Or my secretary did.

Q. Which ones were prepared in what order?

A. I placed them in the proper order here.

501 was a plan of action which was prepared in Mr. Fred Manske's office. He was then President.

500 was one which was prepared by me or my secretary.

502 was a final one. That was prepared, and that was the one which was finally given back to Mr. Manske and told that all of these things had been accomplished.

[13,111]

Q. Now, 500 has some handwriting on it. Was that Mr. Atwell's handwriting?

A. Yes, it is.

Q. And was this a copy that you provided to him?

A. It is either a copy provided for him, or else it is a copy that I had and he and I discussed it and he made those changes.

Q. Now, if you had the information from the field—Mr. Wright, who called it in from Milwaukee to Mr. Hayes—that National Gypsum was changing its prices effective December 15, 1965——

A. You mean U. S. Gypsum?

Q. That's what I meant.

A. Yes. Yes.

Q. Why is it then in the first document that was prepared, which you have identified as Government Exhibit 501, that the effective date that you planned for National Gypsum was December 18?

A. Well, that just happens to be the date when Mr. Manske was writing this that Mr. Manske and Atwell and myself decided to put this into effect. No other reason. It is just—I think I have testified, and you probably know it—that we normally, for many reasons, made out price

changes effective on the week-end or on a Monday. Outside of that, there is no other reason.

[13,112]

By Mr. Fricano:

Q. Have you always had as clear a recollection, sir, of how these documents originated as you do today?

A. Yes, sir.

Q. Sir, is it within the policy as you understand it of National Gypsum to seek and obtain from competition price lists?

A. Well, at one time I don't think it was against the policy of National Gypsum to obtain already published price lists which had become public knowledge. It certainly was against the policy of National Gypsum, and it was so stated in Mr. Wagner's treatise, I believe, that it is against the policy to obtain anything which has not been published and isn't public knowledge.

Q. Well, were you not asked the following questions and gave the following answers at page 501 of prior testimony.

"Question: Where did you ordinarily procure them?

"Answer: From the field.

"Question: You don't call USG up and ask them for a price list and things like that, do you?

"Answer: No.

"Question: That is against company

[13,113]

policy, isn't it?

"Answer: Would you ask that question again.

"Question: Isn't it against company policy to call the competitor, the U. S. Gypsum Company, and ask them for a price list?

"Answer: Yes."

Were you asked those questions and did you give those answers at a prior time?

Mr. Warnke: I object, Your Honor. That is not inconsistent with the testimony.

The Court: It is not inconsistent with the testimony.

Do you want Mr. Nicely to repeat what he said before? He said it once wasn't against the policy.

Isn't that what you said, Mr. Nicely?

The Witness: Yes, it was not for documents.

By Mr. Fricano:

Q. When was that, sir?

A. In answer to your question just a minute ago, I think it was not against our policy to ask them for price lists which had already been published, and the prices which already were in effect. It was against our policy to ask for a price list or any information which was not

[13,114]

public knowledge. And I think what you read there, if you search out a little further on, I so testified in that same document that I was speaking about only against our policy to ask for documents which had not become public knowledge and had not been published.

Q. Then with respect to published prices now as distinguished from the other kind—

A. Yes.

Q. —did Mr. Atwell to your knowledge, from time to time, when prices changed, both furnish National Gypsum's price sheets to competitors and in return obtain such price sheets?

A. I could not answer that yes of my own knowledge.

Mr. Fricano: No further questions, Your Honor.

The Court: Is there any redirect?

Mr. Warnke: I have just one set of questions, Your Honor.

—

RE-DIRECT EXAMINATION

By Mr. Warnke:

Q. Mr. Nicely, you have been shown GX Exhibit 501, GX Exhibit 500 and GX Exhibit 502?

A. Yes, sir.

Q. And I believe you testified that is the order

[13,115]

in which they were prepared; in other words, 501 was first, 500 was second and 502 was third; is that correct?

A. 501 was first; 500 was second; and 502 was third; that is right, sir.

Q. Now, GX 501 I gather is the plan of action that was dictated by Mr. Manske; is that correct?

A. Yes, it is.

Q. And how do you know that?

A. Well, I was in his office when he dictated it and I was handed a copy of this by Miss Ruth Anderson after she finished writing it.

Q. GX 500 you testified was prepared by you?

A. Yes, it was.

Q. All right. Now GX 500 I notice has handwriting on it which you have identified as being that of Mr. Atwell?

A. Yes, sir.

Q. The typed part of GX 500 indicates that there are nine paragraphs, whereas there are eight paragraphs on Mr. Manske's original?

A. Yes.

Q. How did that come about?

A. If you look at the paragraph which is split, you will find it is quite a long paragraph.

Q. That is paragraph 7 of Mr. Manske's GX 501?

[13,116]

A. That is right.

Q. And what did you do with that paragraph?

A. I simply split it. I thought it was easier to read and less likely to miss something in it, so I split it.

Q. Then I notice that on GX 500 your paragraph 9, which is the one that you added when you split out paragraph 7—

A. Yes.

Q. —has been crossed out?

A. Yes, sir.

Q. Do you know how that came about?

A. Well, I think it was moved back up to—it was either moved back up to eight, or, as Mr. Atwell said, it was redundant and wasn't necessary.

Q. So it was Mr. Atwell who struck out paragraph 9 and moved the substance of paragraph 9 into 8 and 7?

A. Yes, that is Mr. Atwell's writing.

Q. Does that return the substance of paragraph 7 and paragraph 8 to the way it was in GX 501, the Manske original?

A. I think substantially the same, yes.

Q. Yes.

But is the language identical with that which exists in paragraph 7 and paragraph 8?

[13,117]

A. No, there is a—I think he dropped the word "a," or letter "a" out.

Q. All right.

Then turning to 502. You testtified that that was also prepared by you; is that correct?

A. Yes, it was.

Q. And from what was that prepared?

A. That was prepared from 500.

Q. And did that contain the exact language in 500 as revised by Mr. Atwell?

A. I think it contains 100 per cent the language plus every other change that was made in 500 and 501.

[13,118]

By Mr. Warnke:

Q. Directing your attention to paragraph 6 of the Manske original, GX 501—

A. Yes, sir.

Q. —this is the one that was prepared on November 17, is that correct?

A. Yes, sir.

Q. And paragraph 6 reads, "Division managers to contact all division managers to discuss contents of teletype and the need for soliciting additional business at present prices."

Did you correct that in any way in preparation of GX 500?

A. Yes, I did.

Q. How does that read?

A. Division managers to contact all district managers.

Q. Is that correction carried over into GX 502, which is based on GX 500?

A. Yes, it is.

Q. Then I notice that in GX 501, the Manske original, in paragraph 8 it says, "Our new policy will become effective midnight, December 18."

It has been crossed out and 14th put in.

A. Yes, sir.

Q. Do you know who put in that 14 and crossed out

[13,119]

the 18?

A. I don't know who put in the 14 on there.

Q. When you prepared GX 500, was that prepared at a time when GX 501, the Manske original, contained the original date of December 18?

A. Yes.

Q. When was that date of December 18 changed to December 14?

A. On the—on or after the 19th of November.

Q. And, in fact, your new policies were made effective on midnight, December 14?

A. Yes, sir.

Q. When did you prepare GX 500 from GX 501?

A. Well, I think 500 was prepared on the—it would have been prepared on the 18th.

Q. That is the following day?

A. That is the following day.

Q. And GX 502, you say would have been prepared on the 19th or thereafter?

A. Or thereafter, yes.

Mr. Warnke: I have no further questions, Your Honor.

Mr. Fricano: Nothing further, Your Honor.

• • •

[13,133]

COLON BROWN

Direct Examination

By Mr. Warnke:

Q. Prior to that, prior to January 1, 1965, in your years with United States Gypsum, and in your years with

National Gypsum Company, had you ever had anything to do with the sale of wallboard? Of gypsum wallboard, that is.

A. None whatsoever.

Q. Then beginning on January 1, 1965, I take it that you assumed responsibility for all of the products of the company?

A. Well, I think that Chief Executive Officer describes what the responsibilities are. That's where the buck stopped, and that means everything.

Q. And the company, from your description, has a number of products in addition to gypsum wallboard; is that correct?

A. Hundreds. Broken down in all of its parts, thousands.

Q. So that your responsibilities then, with respect to gypsum wallboard began on January 1, 1965, and were just a part of your overall responsibilities?

A. That is correct, sir.

Q. All right.

Mr. Brown, turning to the period of 1965, after you became Chairman of the Board, there is in evidence a calendar of yours which indicates, Mr. Brown—As a matter of fact, a series of calendars that indicate that during

[13,134]

1965 on some occasions you met with Mr. Graham Morgan, who was Chairman of the Board of the United States Gypsum Company.

Do you recall those meetings?

A. I certainly do.

Mr. Warnke: Mr. Grainer, could the witness have Defendant Brown Exhibits 1 through 17, 18A and B, 19, 20, 57, and also Government Exhibit 543.

By Mr. Warnke:

Q. While Mr. Grainer is getting those, let me ask you, Mr. Brown, if you can remember the subject matter or subject matters that were involved in your meetings with Mr. Graham Morgan in 1965?

A. Yes, sir. I can hardly forget.

Q. Would you describe for us what the discussions were about?

A. Well, almost immediately after I occupied the office of Chief Executive Officer with the title of Chairman of the Board, I was put on notice that we had immediately before us some pressure points, meaning pressure for time, with regard to several patent litigations, lawsuits, where U. S. Gypsum Company were the plaintiffs against National Gypsum Company.

Q. And were these alleged patent infringement suits, or just what was the nature of these suits?

[13,135]

A. Yes, sir.

They were claims that we had used certain arts, methods, products, et cetera—I don't remember the details now—that was in violation of then existing patents allegedly owned by U. S. Gypsum Company.

Q. And do you remember—Let's see.

According to your calendar which is Government Exhibit 536, there is an entry for the date of January 18. And this is your calendar.

It says,

"Chicago. Mr. Manske. Company plane. P. M. U. S. G."

As a matter of fact, it says "P. M. Detroit, U. S. G."

A. Yes, sir. I recall it.

[13,222]

By Mr. Warnke:

Q. Possibly November 17, November 18, 1965; is that correct?

A. It would likely be in one of those two dates.

Q. Then finally, Defendant Brown Exhibit 46, is the contract of settlement mentioned in the previous letter, and indicating it was entered into this 19th day of November, 1965, disposing of the Van Hazmburg and Camp patent controversies; is that correct?

A. That is correct, sir.

Q. Now, Mr. Brown, we have gone through a number of documents which indicate that throughout 1965, beginning on January 18, you had intermittent contacts with Mr. Graham Morgan and others at U. S. Gypsum Company, but principally Mr. Morgan, both in meetings and in telephone conversations.

Now, in any of those meetings, and in any of those telephone conversations, did you ever discuss in any way what the plans of either company might be with respect to prices of gypsum wallboard?

A. No, sir. Our discussions were as has been indicated by all of this documentation that you have been reading.

Q. Now, the record in this case shows that on November 17, 1965, about contemporaneous with the final

[13,223]

settlement of the Camp and Von Hazmburg patent suits, that there was an announcement of a price change which was issued by United States Gypsum to be effective on December 15, 1965.

In any of your meetings or in any of your telephone conversations, one of which may have taken place on No-

vember 17, did Mr. Morgan ever indicate to you any of the plans of U. S. Gypsum with respect to its prices on gypsum wallboard?

A. My first knowledge of that subject came subsequent to the announcement that U. S. Gypsum Company published, that they were taking some price action. There was never any discussion remotely related to such a subject prior to that with Mr. Morgan.

Q. And did he ever hint to you with regard to any sort of a price announcement that U. S. Gypsum might be making?

A. No, sir, I had no indication.

Q. Did you ever discuss with him what your plans might be with respect to the prices on gypsum wallboard?

A. No, sir.

Q. Now, Mr. Brown, subsequent to 1965, did you ever have any meetings or telephone conversations with Mr. Morgan or with anybody else from U. S. Gypsum with respect to this remaining patent controversy, the so-called

[13,224]

Spark Tape case?

A. Yes, sir.

Q. And I call to your attention—it is not necessary for you to look at it, it is in evidence—to your 1968 calendar for the date of February 3, 1968, Government Exhibit 1665. It indicates: "Mr. Morgan. Spark Tape."

Now, does that recall to you that you met with Mr. Morgan on February 3, 1968, with regard to the Spark Tape case?

A. I have no specific recollection that it was February.

Is there anything that I can look at to help refresh my thinking?

Q. Just the calendar entry, Mr. Brown, which is already in evidence.

But do you recall a meeting at some time around that date with regard to the Spark Tape suit?

A. Would the calendar indicate where the meeting was?

Q. No, it doesn't indicate where the meeting was.

Now, subsequent to 1965, you have indicated you did meet with Mr. Morgan with respect to the Spark Tape case. And the calendar entry shows a meeting on February 3, 1968.

Would there have been a meeting in between that

[13,225]

date and late 1967 at some time?

A. You will have to help me with the time. Let me refer to the times that I talked to Mr. Morgan about the Tape case.

Q. Please do.

A. I believe it was the first occasion subsequent to 1965 when, apparently, because of some development in the proceedings, legal proceedings, that is, that there was a basis for Mr. Morgan to take an interest in settling this case, notwithstanding the fact that it had been proposed many, many times beginning as far back as January of 1965 that we include the Spark Tape case in our consideration for settlement; therefore, settling all three cases.

As I recall the entire history of this, it seemed that at some point in time National was in an advantageous position based upon the proceedings in the courts, and at other times it was U. S. Gypsum in the advantageous position. And in simple language, it had seemed that those who were on the low-end of the totem pole at any given time were interested in settling for that same reason, and the other one wasn't.

And I recall Mr. Morgan asking me for the opportunity to discuss the Spark Tape case. I believe that the first meeting I had was as a result of his coming to

[13,226]

Buffalo, and at his request setting up the appointment that I meet him at the airport in order to accommodate a quick trip and quick return on his part.

Q. And what occurred at that airport meeting?

A. Well, he did in fact propose that now we settle it. And there was some—there was a fairly clear indication that what he had in mind was our paying U. S. Gypsum Company more money, but based upon what the payments would have been had we had a license during the period that there was an alleged infringement, which was exactly the basis much earlier that we had suggested that we were willing to consider.

I was, unfortunately, although I would have liked to have settled the case, in a position that I had to advise Mr. Morgan that it would not be appropriate for us to seriously consider it, that it had gone as far as it had gone, but, more importantly, that I had the potential obligation, monetary obligation to our patent counsel in Chicago which related to the contingency arrangement that I believe was alluded to earlier in this agreement with the patent counsel.

And, simply stated it was: "We pay you so much for the services rendered, but dependent upon the outcome we will or will not pay you an additional amount." And one of the conditions to that agreement, as I understood it,

[13,227]

was if we settled, took it upon ourselves to settle at any given time, that the contingency amount became due, and

I so explained this to Mr. Morgan as my basis for not being willing at that time to entertain settlement.

Q. And the calendar entry for February 3, 1968, indicates that February 3 was a Saturday. Is it your recollection you met at the airport on a Saturday?

A. Yes, this was on a weekend.

Q. It was on a weekend?

A. Yes.

Mr. Warnke: Mr. Grainer, might the witness have Defendant Brown Exhibits 47, 58, 48 and 49 through 56, as well as USG Exhibit 675.

By Mr. Warnke:

Q. While we are getting those, Mr. Brown, let me mention the Government Exhibit 1667 which is in evidence, is your calendar for 1971. It contains an entry for August 16, 1971, which indicates that at nine o'clock you took off for Chicago for a meeting with Graham Morgan.

Do you remember meeting with Graham Morgan and possibly with others on August 16, 1971, or about that date?

A. Well, here again, I cannot recall the date. I am reasonably certain that it was at about that time that I did have further discussions in Chicago with Mr. Morgan

[13,228]

about the Spark Tape case.

Q. And, Mr. Brown, would you look at the exhibits Mr. Grainer has furnished to you at my request, and would you indicate to us whether they too are memoranda and correspondence with regard to a patent controversy, or a patent controvery between the U. S. Gypsum Company and the National Gypsum Company?

A. Am I supposed to have 59?

Q. No, you were not supposed to have 59, Mr. Brown, not at this point.

A. And am I supposed to have 675?

Q. USG 675, yes, you are.

A. These that I have all relate to the same subject.

Mr. Warnke: I offer the exhibits, Your Honor.

Mr. Fricano: May I have just a moment, please, Your Honor, on one exhibit.

(Conference between Mr. Fricano and his associates.)

Mr. Fricano: May I have some voir dire on one exhibit?

The Court: Which one?

Mr. Fricano: Number 58.

The Court: All right.

[13,229]

VOIR DIRE EXAMINATION

By Mr. Fricano:

Q. Would you please look at No. 58, Mr. Brown.

A. Yes, sir. I have it.

Q. Do you recognize that handwriting?

A. Yes, sir.

Q. Whose is it?

A. Mr. William N. North, Senior Vice-President of National Gypsum Company.

Mr. Fricano: No objection to any of these exhibits, Your Honor.

A. Yes, I sure do.

Q. And do you remember how you happened to adopt that policy on the recommendation of the people that you have described?

A. Yes, sir. It was simply this, that we were announcing published prices to be employed in our invoicing procedures, and that there were to be no exceptions. And those, by the way, were my orders, and it was my method of policing when I made it clear that if any exceptions were to be made they were going to be made with my specific approval.

Q. And that would be your specific approval with

[13,256]

regard to any meeting of competitive lower prices; is that correct?

A. This is correct. Any exceptions to the published price, and also the change in published price.

Q. Now, the evidence also shows that the announcement which was received from the field by the National Gypsum Company, the announcement of of U. S. Gypsum Company, announced the elimination of competitive discounts and an intention to stick by published prices?

A. Yes, sir.

Q. Was your action taken to follow that lead by the U. S. Gypsum Company?

A. I was delighted with the opportunity to do something with prices including eliminating exceptions to list price.

Q. And was that decision to follow the U. S. Gypsum Company lead made by you unilaterally in the exercise of your own business judgment?

A. Well——

Q. I mean, unilaterally—I am using again the word "you" to mean the National Gypsum Company, and not just Colon Brown.

A. Yes, the "you" referring to National Gypsum.

Q. And the "you," Mr. Colon Brown, at the recommendation of your subordinates?

[13,257]

A. That is correct.

Q. You decided to follow the policy which was contanied in the U. S. Gypsum announcement; is that correct?

A. Correct.

Q. Had there been any agreement with U. S. Gypsum Company or anybody else that you were to follow an announcement of theirs?

A. None.

Q. Now, in that connection you indicated that you gave orders that no competitive discounts were to be met.

Was there any particular policy adopted, effective December 15, 1965, with respect to single plant producers?

A. No, we just simply took the position that we were going to sell at our list price, and, therefore, we were not going to meet anybody if that situation arose, and that would include the single plant or multi-plant, anybody in the gypsum business.

Q. Now, there is also evidence in the record, Mr. Brown, with regard to a change in credit terms that was made by the National Gypsum Company effective on March 1, 1966.

Do you remember a change in credit terms at or about that time?

A. Yes, I remember this subject in a fairly general

[13,258]

way. My interest was price, but I did know about the

subject of terms or conditions or whatever that means. I am today not too sure exactly what it means.

Q. There are documents in the record, Mr. Brown, and I am sure that during your presence here you have heard them referred to, that indicate that beginning in about August of 1965 that there was a study made of credit terms, the credit arrangements that were being offered by the National Gypsum Company; do you recall such a study?

A. Well, I remember over a rather lengthy period of time that there was considerable attention given to this overall subject for several reasons.

Q. What were those reasons?

Mr. Warnke: And, Mr. Grainer, may the witness have Government Exhibits 908 and 910.

By Mr. Warnke:

Q. While he is getting those, what were the reasons that motivated the study of credit terms on the part of the National Gypsum Company?

A. Well, it relates to several things. In the first place you will be reminded that my background is one of operations, and if I know anything at all, I know a little bit more about operations than how to promote merchandise products. Therefore, I would be very sensitive to an

[13,259]

understanding of the economic impact on a manufacturing plant that was faced with a vacilating type of schedule, meaning an unbalanced schedule.

For example, most any straight line operation—and manufacturing gypsum board is a straight line operation—that a complete shutdown of the plant and bringing it back on to line is a relatively high-cost activity as opposed

to a continuous operation; thus, the theory that I am talking about is that if you were going to run a plant 15 days in a month, it would be disaster to run it every other day. The preferable way would be to run it for 15 days, and then not operate it for 15 days.

And it came to my attention that we were having that kind of an experience in some of our plants as a result of heavy flow of orders into some of our plants at certain times of the month, and that same plant being void of orders at other times during the month, that same month.

And someone recommended to me that the substantial reason for this was the customer's ability to pick a day to his advantage, and his advantage meaning that if he made a purchase on a given day, he would have, let's say, 40 days to pay the bill. If he had bought it the day before, it might not have been more than 10 days to pay the bill, and thus he was picking his day.

[13,260]

And, as a result of this, I took an interest and requested appropriate people, I believe Mr. Manske, president, and possibly Mr. Wagner, our top financial man, to look at this matter and requested that if there is anything here that can be done that is sound businesswise, that I would like to know about it, and I would like to have some recommendations as to what to do.

Q. And at that time, Mr. Brown, did you have any knowledge of studies of credit terms being made by any other gypsum manufacturer?

A. No, sir.

Q. Now, do you have before you Government Exhibit 908?

A. Yes, I do.

Q. Now, this is the memorandum from you to Mr. Wagner dated December 10, 1965, headed: "Sales Terms, Confidential."

And it says:

> "We are seriously considering substantial changes in terms on sales made to our trade. It is likely that National would take the lead in introducing such changes in the market.
>
> "Will you please presume that the decision has been made to make such changes as are found to be sound and practical and that will produce added profits

[13,261]

> and less capital tie-up in receivables in a complete package ready for execution on short notice after the final decision has been made to introduce such changes.
>
> "Please bear in mind that your assumption that the decision has been made is purely an assumption at this time. It will be necessary that you and other appropriate personnel develop definitive new terms followed by development of a specific procedure for administering such a new program.
>
> "When this had been completed, I suggest that a meeting be held including all who are concerned with the view of a thorough presentation being the basis for a final decision at that time. We are currently thinking of advising the trade before the first of the year.

> "Please advise me of your schedule for complying with this request."

Now, I notice, Mr. Brown, there is no specific proposal made by you in this memorandum; is that correct?

A. I am asking for a proposal.

[13,262]

By Mr. Warnke:

Q. And this is consistent with what you have described as being your managerial technique for your subordinates to come up with proposals?

A. Also indication of a further part of the technique, bearing in mind that this subject—more related to what I just testified to—had been ongoing since, as I recall it, about the middle of the year.

And I say, slightly facetiously, this was also a bit of a needle to the gentlemen that, "Let's get going. It is time now to quite studying. It is time to do something."

Q. Well, I have called your attention, Mr. Brown, previously to the fact that your calendar indicates a meeting with Mr. Fredericks on this same date, December 10, 1965.

Was there any connection of any sort between this memorandum and any meeting or discussion you might have had with Mr. Fredericks?

A. It is just as coincidental as one friend bumping into another friend by surprise at an airport.

Q. In other words, you are saying that there was no connection between the two?

A. Absolutely none.

Q. I call your attention to Government Exhibit 910,

[13,263]

which is an excerpt from the board meetings of the National Gypsum Company board on December 21, 1965.

The Court: Proceed, sir.

Mr. Warnke: Thank you, Your Honor.

COLON BROWN

Resumed the stand, and having been previously sworn was examined and testified further as follows:

DIRECT EXAMINATION (Continued)

By Mr. Warnke:

Q. Mr. Brown, you have heard, of course, the testimony with respect to the verification with competitors of reported lower competitive prices or more favorable terms and conditions that from time to time occurred by employees of the National Gypsum Company?

A. Yes, sir.

Q. Is that correct, sir?

A. Yes.

Q. When you became Chairman of the Board in January of 1965, Mr. Brown, did you know about this practice of verification of competitive prices by calling competitors to check on what customers had reported?

A. No, I was not acquainted with such a procedure.

[13,267]

Q. Did you ever authorize this procedure?

A. No, sir.

Q. Did you leave it in the form it was at the time that you became Chairman of the Board?

A. Well, by omission, knowing nothing about it.

Q. Now, when did you first learn that National Gypsum Company employees were checking with competitors on customers reports as to the competitor's lower prices?

A. Is the question when did I learn?

Q. Yes.

A. About the procedure of verification?

Q. That's correct.

A. My first real understanding, to the extent that I even have it now, occurred sometime, I believe, in 1968. And I became acquainted with it as a result of the subject being a part of, a total subject regarding certain other litigation.

Q. Now, when you learned of it, what was your understanding as to the purpose of these verification calls to check on customers' reports of competitive prices?

A. Well, my understanding was not in detail. But, broadly stated, it was an exercise or an effort to avoid discrimination in sale prices to like customers.

Q. And was it your understanding that this had been cleared by legal counsel; or, was it something that had been

[13,268]

conducted without legal counsel's consideration?

A. No. When I became acquainted with the subject of verification, part of my understanding was that it had been guided by legal counsel.

Q. Did you ever ask anybody to verify a competitive price by calling a competitor?

A. No, sir.

Q. Did you ever, yourself, talk with any employee of any competitor, with Mr. Morgan, or with anybody else, with regard to the prices that they were charging as reported by customers that they learned from any source?

A. None.

Q. Do you know whether this practice of verification calls was ever stopped by the National Gypsum Company?

A. Yes. As a result of—Well, I became acquainted with the need for stopping it at a time when it was suggested that we needed to change our stated written policy.

The Government charges that the preparation, use, and exchange of job price protection lists was pursuant to an agreement to raise, fix, maintain, and stabilize prices.

The question is one for you and you alone to determine, under all the facts and circumstances, in accordance with the law, as I gave you. You must determine what was the purpose of the job protection list. Was it

[14,853]

for the purpose that the Defendants state, to avoid somebody telling them that there was job protection when there was not, and thus to work a fraud on them? Or was it for the purpose the Government states, to raise, fix, maintain, and stabilize prices in this manner?

This is a question that you are going to have to decide from all the evidence in the case.

The next group of means and methods asserts, in substance, that the Defendants and alleged co-conspirators exchanged price and other competitive information with each other and that the information was given and received in order to raise, fix, maintain, and stabilize list prices in the gypsum industry.

As I understand the situation—again, this is for you and not for me—but, as I understand it, the Defendants do not dispute the fact that they did exchange price and other competitive information among themselves and with each other and with others. However, they say there was no agreement to do so, and they say that the purpose of such exchange of competitive information, which they call verification, was not to fix, raise, maintain, and stabilize prices, in violation of the Sherman Act, but, rather, they claim the purpose was solely to insure their compliance with another antitrust law known as the Robinson-Patman Act.

checking would also offer it. And I don't think it was limited to prevention of fraud subject, sir. In other words, it is also the meeting competition problem.

And then when Your Honor went forward in discussing the Robinson-Patman Act, you said that the Defendants do not dispute that they did engage in verification. That is correct, sir; although your comments were not time limited. There is a contention, as I understand it, by USG that they stopped in 1968, and National in January of 1969.

The Court: I didn't comment on time.

Mr. DeLone: You didn't comment on the time at all, sir. I would ask that you do that.

The Court: Well, I haven't commented on evidence anyplace else, and I am not going to comment on it there. You have certainly discussed that quite adequately. And I will tell the jury, of course, that your own summary of contentions is to take precedence over mine.

Mr. DeLone: Yes, sir. I did discuss

[14,904]

it. There is no question about that. And I don't dispute what Your Honor said except for the time factor. You then said that it was solely—that is, the checking or verification—our contention was solely to insure compliance with the Robinson-Patman Act. There was the further contention of prevention of fraud by the lying buyer.

The Court: You said that. I told you I would tell them that.

Mr. DeLone: This is not limited to the job price protection, but to the verification generally, sir, so that I make myself clear.

could excuse that would help the situation? If it is more than that, there is no point.

Mr. Russell: I think there is more than that, Judge. I am not a doctor, so I can't say. I'm not even sure these are true sicknesses. They seem—I mean, with the high and low, they seem induced, but when a person thinks they are sick, they're generally sick.

The Court: It is just as bad, if they think they are.

Mr. Russell: As I say, I am not a doctor. I don't like to be a judge, but I think for my own sake, my feelings, it is my responsibility as foreman to tell you these things. I do not want to be responsible for anybody's health.

The Court: I don't, either.

[4]

You recall, though, that before—when I had two alternate jurors, I asked all the jurors if there was anybody who was not physically able to go ahead and everybody wanted to do it.

Mr. Russell: I realize that. I think every juror out there wants to do their duty.

The Court: See, we have tried this case now for four months.

Mr. Russell: This is part of it, I will grant you, but it is not the whole part of it. There is some personality conflicts on the jury that have led to certain situations and I think we have overcome those.

The Court: If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer——

Mr. Russell: What I want to tell you next is—and that is, again, my opinion—and you can tell me I am wrong—

and I have to look at it in a different way. We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony. It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no, because I believe in the twelve or multiple system of a jury; that if we are to decide beyond a

[5]

reasonable doubt, when you get twelve, or whatever the number has to be——

The Court: That is what you have to decide.

Mr. Russell:—it proves it beyond a shadow of a doubt.

The Court: Not beyond a shadow of a doubt.

Mr. Russell: I know. Each individual proves it to himself, but for a man to be convicted guilty, or the company, we do it beyond a reasonable doubt, but if you have twelve, you know it is beyond a shadow of a doubt and you cannot have any conscience over it as far as a juror or anything else. That is the way I feel, Judge.

The Court: What are you suggesting?

Mr. Russell: I am asking you what I should do. I am to the point——

The Court: I would like this jury to deliberate longer. I say that because, as I say, we have tried it for a considerable period of time.

Mr. Russell: Everybody realizes that and I do.

The Court: We have individual people here who are concerned and the jury has now deliberated—they de-

Selected Exhibits From the Trial Below

GX 25

J. P. Hayes—
Vice President
J. P. Nicely—
Vice President

December 12, 1969
Vice President—
Sales Administration

PRICE VERIFICATION

Dear Jack and Jay:

I believe I did advise you men of the following action taken by me early this year to stop price verification calls in the Building Products Division of our company. I am not sure Colon was ever made aware of this decision. As Chief Executive of our company, I think he should have this information. If you agree, please route the extra copy to Colon.

As you know, I have been in constant touch with outside counsel for several years regarding anti-trust regulations. Very early this year, counsel advised me of the decisions in the Container Case and emphasized the telephone price verification aspect of that case. Even though this activity in the Container Case is significantly unlike that which was infrequently used by us, we were advised that until clarification of the Container decision "serious consideration should immediately be given to complete cessation of verification calls." Based on this counseling, and only as a result of this counseling, I have made no verification calls since sometime in January 1969.

We, at National Gypsum Company, know we did not violate our internal anti-trust policies nor the laws of the land as regards anti-trust. We did not discuss future prices, policies, terms or conditions of sale with any competitor nor did we enter into, or discuss, any agreements on any of these items, nor on distribution, sharing of markets, selection of customers, etc. We simply answered specific inquiries with a "Yes" or "No" and only inquired about

specific reports received from our Sales Force of competitive activity. I am knowledgeable of the above because I believe I am the only one who made any of the occasional verification calls by our Building Products Division in many years.

However, making the above decision doesn't necessarily lead me to believe we have no other concerns. To the contrary, I continue to be concerned about possible inadvertent violations of the Robinson Patman Act. We have done our best in good faith to make our decisions in meeting competitive situations on whatever evidence was available. There may have been cases where we were deceived by customers, and as a result, met false competitive reports. This leaves a question in my mind as to whether or not we have exercised every precaution legally obtainable. This kind of decision making will be a risk that, in our division, we will continue to take until we get further clarification of the legality of telephone price verification calls where the purposes thereof are to avoid fraud and to obey the Federal law against price discrimination among customers.

K. H. Atwell

GX 500

PLAN OF ACTION

Nov. 17th—1. Procure USG letter to dealer

Nov. 17th—2. Procure USG letter to Sales Force

Nov. 19th—3. Procure USG price list for all zones

Nov. 19th—4. Initial USG dealer letter to be wired by Nicely to all Region, Division and District Managers

Nov. 19th—5. Each Region Manager to contact their respective Division Managers by phone to discuss contents of teletype message and the need for our Sales Force to start soliciting additional business at present prices.

Nov. 19-20—6. Division Manager to contact all District Managers to discuss contents of teletype and the need for soliciting additional business at present prices.

Nov. 24th—7. Atwell responsible for the preparation of new price lists by zones to make us competitive to be mailed no later than November 24th to all Company internal departments, field Sales offices, Plant offices and entire Sales Force together with copy of company policy to entire sales force.

Nov. 24th—8. Letter and new zone price lists (prepared by Atwell, Brown and Nicely) to all National Gypsum Company dealers advising them of our new policy that will become effective midnight December 18th.

GX 501

PLAN OF ACTION

Nov. 17th—1. Procure USG letter to dealer.

Nov. 17th—2. Procure USG letter to Sales Force.

Nov. 19th—3. Procure USG price list for all zones.

Nov. 18th—4. Initial USG dealer to be wired by Nicely to all Region, Division, and District Managers.

Nov. 19th—5. Each Region Manager to contact their respective Division Managers by phone to discuss contents of teletype message and the need for our Sales Force to start soliciting additional business at present prices.

Nov. 19-20—6. Division Managers to contact all Division Managers to discuss contents of teletype and the need for soliciting additional business at present prices.

Nov. 24th—7. Atwell responsible for the preparation of new price lists by zones to make us competitive, to be mailed no later than November 24th to all Company internal departments, Field Sales Offices, Plant Offices, and Entire Sales Force, together with a copy of the Company Policy to entire Sales Force.

Nov. 24th—8. Letter and new Zone Price Lists prepared by Atwell, Brown, and Nicely, to all National Gypsum Company dealers advising them our new policy that will become effective midnight, December 14th.

GX 502

PLAN OF ACTION

Nov. 17—1. Procure USG letter to dealer.

Nov. 17—2. Procure USG letter to Sales Force.

Nov. 19—3. Procure USG price list for all zones.

Nov. 19—4. Initial USG dealer letter to be wired by Nicely to all Region, Division and District Managers.

Nov. 19—5. Each Region Manager to contact their respective Division Managers by phone to discuss contents of teletype message and the need for our Sales Force to start soliciting additional business at present prices.

Nov. 19-20—6. Division Manager to contact all District Managers to discuss contents of teletype and the need for soliciting additional business at present prices.

Nov. 24—7. Atwell responsible for the preparation of new price lists by zones to make us competitive to be mailed no later than November 24th to all Company internal departments, field Sales offices, Plant offices and entire Sales Force, together with copy of Company policy to entire Sales Force.

Nov. 24—8. Letter and new zone price lists (prepared by Atwell, Brown and Nicely) to all National Gypsum Company dealers advising them of our new policy that will become effective Midnight, December 14, 1965.

DX(NICELY)-1

GX 1553

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CIVIL ACTION NO. 2391

TEXAS GYPSUM COMPANY, INC. and
ROSARIO EXPLORATION COMPANY
Plaintiffs

VS.

UNITED STATES GYPSUM COMPANY, et al.,
Defendants

Answers to Plaintiffs' Additional Interrogatories to Defendant National Gypsum Company

Defendant NATIONAL GYPSUM COMPANY hereby answers the additional interrogatories served upon it by Plaintiffs on July 15, 1964 as follows:

ANSWER TO ADDITIONAL INTERROGATORY NO. 1:

Mr. John L. Dickson
National Gypsum Company
325 Delaware Avenue
Buffalo, New York 14202

(National Gypsum Company employs no person by the name of C. C. Gustauvis.)

ANSWER TO ADDITIONAL INTERROGATORY NO. 2: Yes.

a) Dealer Sales Manager

b) Vice President-Sales, 325 Delaware Avenue, Buffalo, New York 14202

ANSWER TO ADDITIONAL INTERROGATORY No. 3: Yes.

a) Yes

b) (i) Groves Lumber Company's purchases from National Gypsum Company;

(ii) Texas Gypsum Company;

(iii) Competitive decreases in gypsum wallboard prices;

(iv) Reasons for purchasing from National Gypsum Company;

(v) Trucking of gypsum wallboard;

(vi) National Gypsum's salesman, and

(vii) Metal or wooden eagle

c) Yes.

d) (i) Mr. Tinsley asked why were all the big gypsum companies jumping on Texas Gypsum. Mr. Nicely replied that he didn't know about that and that National wasn't doing so and didn't meet Texas Gypsum's competition.

(ii) Mr. Tinsley asked why competitive manufacturers should fight Texas Gypsum and Mr. Nicely replied that he supposed that unless other manufacturers were so competitive, Texas Gypsum might enlarge and expand at the expense of lost business to other manufacturers. Mr. Nicely inquired why Texas Gypsum deserved to take away any of National's business and explained that dealing with National gave the dealer advantages not present in dealing with Texas Gypsum, including a supply of a number of building products not made by Texas Gypsum, a fine Research Department and promotional advertising of gypsum products.

(iii) Mr. Nicely gave his opinion stating that he supposed that the price decrease by USG indicated its intention not to surrender any customer or market area to Texas Gypsum lest Texas Gypsum enlarge and expand at the expense of further lost business to USG.

(iv) Mr. Tinsley said National's former salesman was thin-skinned because after he saw a Texas Gypsum truck at Groves Lumber, he hadn't called on Groves Lumber again and that only Texas Gypsum salesmen had called recently.

e) Sheraton Hotel, Dallas, Texas

(Subscription and Certificate of Service
Omitted in Printing)

DX(NG)-77

PROCEDURE

NATIONAL GYPSUM COMPANY

NUMBER 07-02-01-01
PAGE 1 OF 12
SUPERSEDES:—
APPROVED: J. A. WAGNER
ISSUE DATE: 12/1/67

SUBJECT: Antitrust Law Compliance

AREA OF APPLICATION: All Subsidiaries, Division and Corporate

EFFECTIVE DATE: In effect

REFERENCE: Policy. NG-07-02-01.

SOURCE: The increased scope of the Company's operations emphasizes the need to restate the Company's policy concerning the Antitrust Laws. Violations of the law in any area of the Company's operations may have far reaching effects and may result in substantial injury to the Company in lengthy and expensive litigation, triple damage liability and injunctions or orders affecting its property or business.

SCOPE: 1. While compliance with the Antitrust Law as well as with other laws is of great importance, it is equally important that the Company pursue all lawful competitive activities.

2. The major thrust of the Antitrust Laws is that each company will establish its own prices and terms of sale, select the products to be made and sold by it, and determine the territories and customers it seeks to serve, in the exercise of its own independent business judgment and not by action in concern with others.

3. Intelligent exercise of such business judgment requires an up to the moment knowledge of the marketplace, including the fullest possible knowledge of each competitor's action in the market and all factors which may have a bearing on those actions. Such information will be continually sought in all proper ways and reported to those whose responsibility it is to recommend or make policy decisions. Educational programs will continue to stress what can, as well as what cannot, be done. In matters which lie within the compass of the Antitrust Laws, the Company will seek to avoid not only the "evil" but the "appearance of evil" as well. In order to compete, the Company is required to know its competition and, therefore, is required to keep fully posted on what our competitors are doing. Such knowledge will be passed on to the officer responsible.

4. Participation in the activities of the Trade Associations to which the Company belongs in carrying out their lawful objectives benefits the Company and remains both proper and needful.

5. The objective of Company policy, therefore, is education, self-policing, and the exercise of an educated, good-faith judgment both to comply with the Antitrust Laws and aggressively to compete under them.

RESPONSIBILITY: 1. Every officer, Corporate, Division or Subsidiary, and within each division or subsidiary, each District, Division, Regional and General Manager is responsible for the education of and compliance by personnel under his jurisdiction with this policy and procedure. Questions concerning the applicability of the Antitrust

Laws to any activity or transaction shall follow organizational channels up to the officer in charge. If required, legal clearance shall be obtained through the office of the Corporate Counsel.

2. Violations of this policy by any employee will subject him to possible dismissal or other discipline, as management shall determine.

FORMS: The respective forms used by each division will be listed with instructions concerning procedure for their use.

• • • • • • • • • •

GUIDES TO ADMINISTRATION OF COMPLIANCE WITH ANTITRUST LAWS

(Note: "You" is used for convenience only. It means "the Company". In doing "What You Can Do", each person's responsibilities are determined by his own superior.)

What You *Can't* Do	What You *Can* Do
Agree or have any understanding with a competitor as to prices, terms, or conditions of sale.	Establish your own prices, terms and conditions of sale, in the exercise of independent business judgment, taking into consideration an up to the minute knowledge of competitor's past actions and your appraisal of their probable responses, including possible economic retaliation. It is not *improper* to have your competitors' price lists in your possession—get them *preferably* from the

	customer level or from the competitor (*without discussion or comment*) *after* he has issued them to the trade. It is *proper* to keep a running check, at the customer level on competitors' activities and to report them. The law neither requires nor contemplates that the required independent action shall take place in a competitive vacuum.
What You *Can't* Do	What You *Can* Do
Discuss prospective prices, terms, or conditions of sale, with a competitor; or "complain" to a competitor about his "price cutting"; or listen to his complaint about your prices, terms, or conditions of sale.	Find out, at the customer level, what prices, terms, or conditions of sale a competitor has charged or quoted, or is presently charging or quoting to a specific customer. Information supplied by the customer or prospective customer may not always be accurate, and additional confirmation may be necessary. It is *not unlawful to check* directly with a competitor (*but without comment or discussion of any kind*) about a *past* or present fact—what prices, terms or conditions of sale he *has* charged or quoted—but it is *dangerous* because of adverse inferences which may

be drawn from any competitor *contact* on these subjects. However, if information or rumor at the customer level indicates a significant price change may be occurring, direct confirmation of *past* actions, at the competitor level (*without comment or discussion of any kind*), may be preferable, in spite of possible adverse inferences, to the loss of business which may occur if the company does not promptly confirm and take its own independent action. Such contacts shall be made only by persons authorized by management and who will have direct responsibility to keep such contacts *limited and lawful.*

What You *Can't* Do	What You *Can* Do
Discuss past, present or prospective prices, terms, or conditions of sale with a competitor; or "complain" to a competitor about his "price cutting"; or listen to his complaint about your prices, terms, or conditions of sale.	Find out, in the field and at the customer level and preferably from written evidence, what prices, terms, or conditions of sale a competitor has charged or quoted or is presently charging or quoting to a specific customer.

As a result of a 1969 Supreme Court decision, *any* exchange of price information with a competitor, and even the verification of a competitor's *existing* prices by direct contact with a competitor may be unlawful.

Information supplied by the customer or prospective customer may not always be accurate. Therefore, because of a seller's inability to verify competitive prices with his competitor and the consequent inability to confirm a customer's report, there may be a risk of price discrimination when a reported competitive price is met. This risk may have to be taken in place of the more serious risk of any appearance of collusion by contact with a competitor.

What You *Can't* Do	What You *Can* Do
Use words that imply that competitors act together on prices and terms—this is the "appearance of evil" from which inferences strong enough to convict the innocent may be drawn. (You do this when you speak or write of "the industry price", or complain that a competitor is a "price cutter" or a "*chiseler*", or use the terms "*demoralization*" or "*stabilization*" in relation to prices, or speak of an "*industry price structure*", or charge a competitor with "*violating industry policy*".	Avoid the "appearance of evil" by reporting *only the facts* about competitors' past or present actions. General remarks and comments should be avoided. You may tend to forget that, in the eyes of the law it is the competitor who charges *less* than you do who is doing what the Sherman Act favors.

Consider or discuss prices or terms at any association meeting or otherwise.	Walk out of the meeting, if the subject of prices or terms comes up. Report the incident to your superior; if assurances against recurrence cannot be obtained, resignation from the association is the only alternative.
Agree with a competitor on a share of a customer's business, on selection of customers, or on division of markets by territory or product.	Decide these things for yourself, in the exercise of independent business judgment, but again, not in a competitive vacuum. You can and should consider the power of economic retaliation competitors possess—and you may decide not to seek a greater share of a split-supply customer's business, nor invade a new territory, nor solicit particular customers of a competitor, nor enter the product line specialty of a competitor. If it is your own independent decision, it is lawful—but you can't take the short-cut of agreeing on it.

What You *Can't* Do	What You *Can* Do
Agree with a customer on his resale prices, terms, and policies—this is "vertical" price fixing or "resale price maintenance" and violates the Sherman Act, since none of our products have been "Fair-Traded" under State laws.	Furnish list prices which are simply "suggested" resale prices—but let the customer's decision be his own.
Control a customer's resale prices, terms, and policies indirectly by threatening refusal to do business. by acting on one customer's complaint about another customer's prices.	Select your customers, in the first instance, on the basis (among others) of his pricing reputation, and refuse to do further business if you don't like a customer's pricing methods. There is no short cut—you must either continue to do business with him, without discussing his resale prices, or terminate him *without prior threat* concerning his resale prices.
Discriminate among your customers in prices, terms, services, and allowances, *unless a specific rule or exception applies* under the Robinson-Patman Act.	(1) *Functional Discounts* Charge different prices to groups of customers classified by the function they perform, i.e., wholesaler, retailer, etc. This is generally proper because the classes do not compete with each other in any way that the Act protects. Note: If one customer performs two functions, e.g., both wholesales

and retails, you have a problem for special clearance, since he is not entitled to receive the wholesale discount on any portion of a purchase from you which he does not resell at wholesale.

What You *Can't* Do	What You *Can* Do
	(2) *Cost Justification*
	Reflect all or part of actual cost savings (manufacture, sale and delivery) for a particular customer's orders, in lower prices to him. Cost allowances require an approved cost accounting study at Home Office and Legal Department clearance.
	(3) *Meeting Competition*
	Charge one customer a lower price than others in order to meet in good faith an equally low price of a competitor to that customer.
Charge lower prices to one customer *solely* because the volume of his purchases reduces your unit costs of all production. Typical example: Reduction based on volume of purchases over a calendar period or reduction to a new customer when you are running below capacity.	Attribute the lower unit costs of production, due solely to aggregate volume, ratably to *all* customers whose orders make up the total volume. *Note:* This usually means that no variation is justifiable solely on added overall volume.

Undercut a competitor's low price to one customer, while maintaining your higher prices to other customers.	*Meet, but not beat, competition* is the rule for the "meeting competition" justification under the Robinson-Patman Act. This requires a "Request to Meet Competition" on the official form. *Note:* Even though the Act says "meet" an "equally low" price, you don't have to reduce *all the way down* to the competitor's price—if you can sell in between your level and his low price, this still meets the test of the Act.
What You Can't Do	*What You Can Do*
Pay "brokerage" to a customer, or qualify a mere agency of the customer as a jobber, etc.	Investigate customer classification and be certain that brokerage payments and functional discounts go only to independent, properly classified accounts performing their indicated functions. *Note:* The Robinson-Patman Act makes payments disguised as brokerage *illegal as such*, even if the reduced net price might have been justified openly and without disguise on a cost basis or as a meeting of competition.

***Final Note*: The foregoing is not a treatise on the antitrust laws, but a sketchy outline only to acquaint you with a few basic ideas and concepts; and reading it or knowing it does not make you an antitrust expert. Be alert to clear all situations and/or questions as required by this procedure.**

Excerpts From Trial Transcript

[218] • • • • •

Mr. Fricano: If Your Honor please, I think that is what I just said.

The Court: The jury knows this is not evidence.

Go ahead.

Mr. Fricano: Thank you, Your Honor.

As I started to say, Mr. Watt is going to figure very prominently in this phase of the conspiracy. The evidence will show that at one of these meetings at one of these plush resorts, at Ponte Verde in Florida Mr. Watt was put in charge of what they call the Task Force in the Gypsum Association and that Task Force's objectives seemingly, on the surface, were very legal and very righteous, very good. But the plain fact is that Task Force was a cover-up so that these defendants could get together and agree on terms and conditions of sale. It also enabled Mr. Watt to fly around the country, to visit his competitors and talk about these very things. You will hear and see evidence to that effect.

Mr. Brown and Mr. Nicely also figure very prominently in this aspect of the conspiracy. You will learn from the evidence how they, too, attempted to, whenever and wherever possible, to seek agreement with their competitors, in fact, did effect and obtain an agreement with their competitors.

• • • • • • • • • •

[2555] By Mr. Spradlin:

Q. Mr. Tinsley, just before the recess I was about to begin a discussion with you of the relationship between Groves Lumber Company and National Gypsum which

existed prior to 1962. And I won't dwell on this long, but it is true—is it not—that for some years Groves Lumber had been a customer of National Gypsum? A. That's true, yes.

Q. And had purchased for the size of Groves Lumber a goodly quantity of wallboard from National? A. Yes. Groves is not a big lumberyard, no, sir.

Q. You testified that these purchases, I believe, stopped after you began purchasing from Texas Gypsum Company in 1962? A. My purchases? I did no purchasing.

Q. On behalf of Groves. A. That's right.

Q. You also mentioned on direct examination, I believe, that the Dallas-Fort Worth market was a very important market for the manufacturers of gypsum wallboard? A. Definitely, yes.

Q. A market to which a new company would be attracted? A. Oh, yes.

Q. A market which an existing company would value? A. Yes.

[2556] Q. And so it would also be an important market for National Gypsum Company, which was established in that area? A. Yes.

Q. It would then be a natural reaction—would it not—for National Gypsum and its sales force, members of which depended on sales for their commission income, to want to get that account back? A. Yes.

Q. Now, you mentioned that on Mr. Nicely's visit to Groves on March 22, 1962, he was accompanied by another National Gypsum employee, a man you said was named Forshay? A. Walter Forshay, yes.

Q. Is it not true that Mr. Forshay, this man was the assistant division or assistant district manager, I should say, of National? A. Titles, I pay no attention to that much, the local people as to what title they had.

Q. Let me ask you this: Just prior to that visit, is it not true that a Mr. Richard McPherson had been the local salesman for National, and that he had left National's em-

ploy to work for a local lumber company? A. He was a salesman for them, yes.

Q. And he had left National; do you recall that? A. I could give you no day as to when he left and whom he went to, no.

• • • • • • • • • •

[2521] THE COURT: I don't mean to malign any dentists. I just used that as an example.

MR. DELONE: Just one more thing on that. I understand Your Honor wants to hear it, but I don't mean to malign either dentists or judges. It is awful hard sometimes, no matter how conscientiously the Court tells the jury to forget something they heard, it is very hard to erase it from their minds. I don't think anyone knows how effective such instructions are.

THE COURT: I don't know how anybody can predict what that kind of testimony will do to a jury either. It seems to me to be less than earthshaking.

Can we have the jury, please.

(The jury enters the courtroom.)

• • • • • • • • • •

[3004] BY MR. KECK:

Q. In your study you expected—or Dr. Berliner's for you—to get 70 to 86 percent of the business. What did you think was going to happen to the existing business there? A. I know what should have happened.

Q. Yes? A. If I could take 70 percent of the business at the same price you were selling, I should have been allowed to have it.

Q. Let's not deal with should. Let's get back to what you thought was going to happen to the existing competitors that were there.

Now before your plant opened, you have told us there were quite a number of gypsum producers selling gypsum board in El Paso and in El Paso County and in Odessa and southern New Mexico, is that not true? A. What you are saying to me—and you are right—I under estimated the big gypsum company's integrity.

• • • • •

MR. FRICANO: By the way, if Your Honor please, this is the desk calendar of Colon Brown, the chairman of the Board of National Gypsum.

MR. DELONE: I would like you to state, Mr. Fricano——

MR. FRICANO: This is the desk calendar of Colon Brown's secretary, that was kept for him by his secretary.

THE COURT: All right.

BY MR. FRICANO:

Q. One of the entires for December 10, 1965, states "8:45 Mr. Fredericks, Bestwall;" does it not? A. It does; um-hum.

Q. Now, does that refresh your recollection, sir, that, on December 10, 1965, you either met with or talked with Mr. Colon Brown, chairman of the board? A. It does not.

[8053]

Government Memorandum, May 8, 1975, Docket No. 240

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-347

UNITED STATES OF AMERICA,

v.

UNITED STATES GYPSUM CO., ET AL.,
Defendants.

Price-Fixing Discussions Within the Statutory Period

Conspirators (Price)

National		
5673-74	Atwell	January 1969
6288		Mid-1971
6275	Kroth	January 1969
6339	Webster	Late 1969
Georgia-Pacific		
5449	A. L. Meyer	January 1969
3857-59	McCaskill	June 1969
5247-48	Burch	Early 1972
5257	Fatz	After June 1969
Celotex		
GX 1778	Don Miller	June 1971
6288-89		Mid-1971
5261		Between June '69-'72
5261	Fisch	Between June '69-'72
6288		Mid-1971

Flintkote		
GX 1778	Hal Wagner	June 1971
6341		Late 1969
6289	Warren Malhiot	Before Mid-1971
6289	Anderson	Before Mid-1971
J-M		
6290	Kent Comann	Mid-1971
Texas Gypsum		
6855	Ted Armstrong, Sr.	1972
6290	Ted Armstrong, Jr.	Mid-1971
Republic Gypsum		
1886-87	Rhyne Simpson	1970 or 1971
6288	O. Max Montgomery	Mid-1971

Conspirators (Credit)

USG		
7416	Dick Croak	Mid-1971
National		
7394	Don DeVore	1970
7416	R. D. Barber	Mid-1971
Georgia-Pacific		
7281; 7276	Wayne Tamblyn (was authorized)	December 27, 1973
7305	Frank Bergstrom (GX 1387)	1970

Celotex		
7413	Homer Jarrett (GX 1009, 1010, 1017)	Mid-1971
7411	Kellogg	Mid-1971
7410-11	Reth	Mid-1971
Kaiser		
7305	Frank Rohan (GX 1387)	Mid-1971
Flintkote		
7394	Don Sauer	1970
7417	Roy Garby	Mid-1971
7417	H. Lockwood	Mid-1971
J-M		
7385-86	Doug Hazeltine	1970
7417	Dick Davis	Mid-1971

Respectfully submitted,

JOHN C. FRICANO
Attorney, Department of Justice

Dated: May 8, 1975

Price and Credit Discussions Did Not Stop Prior to Statutory Period

The following people testified regarding price and/or credit discussions with the company indicated. The list also shows the record citations at which these persons testified about such discussions continuing into the statutory period. Not one of these witnesses testified that, prior to December 27, 1968, their co-conspirators informed them that they would no longer continue the practice.

UNITED STATES GYPSUM

Witness	*Checked with USG*	*Checked in Statutory Period*
Atwell	5695	5673-74; 6288
A. L. Meyer	5450-51	5449
McCaskill	3909-12; GX 339	3857-59
J. Van Cleve	6850-52	6855
Simpson	1888	1886-87
Jarrett	7416	7413

NATIONAL GYPSUM

Witness	*Checked with National*	*Checked in Statutory Period*
A. L. Meyer	5451-52	5449
McCaskill	3742	3857-59
J. Van Cleve	6850-52	6855
Montgomery	6288	6288
Simpson	1888-89	1886-87
Jarrett	7416	7413

Supreme Court, U. S.
FILED
AUG 4 1977
MICHAEL RODAK, JR., CLERK

No. 76-1556

In the Supreme Court of the United States

OCTOBER TERM, 1977

COLON BROWN AND J. P. NICELY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1556

COLON BROWN AND J. P. NICELY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioners' convictions.

2. Whether the legal standards set forth by the court of appeals deprive petitioners of due process of law.

STATEMENT

This petition, like our petition in No. 76-1560, *United States* v. *United States Gypsum Co.*, presents questions arising out of a complicated antitrust trial. The statement of facts here supplements the statement in our petition.

1. On December 25, 1973, a grand jury in the Western District of Pennsylvania indicted petitioners, eight other persons, and six corporations, for conspiracy in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. Among other things, the indictment charged that petitioners fixed the prices and the terms and conditions for sale of gypsum board, beginning prior to 1960 and continuing to the time of the indictment. Petitioner Brown has been chairman of the board and chief executive officer of defendant National Gypsum Company ("National") since 1965 (Pet. App. 3a; App. 3467a-3468a, 49ex).[1] Petitioner Nicely, a sales manager with National from 1960 to 1964, became Vice-President of Sales in 1965 (Pet. App. 3a; App. 49ex).[2] National was the second largest producer of gypsum board, with a 24 percent share of the market between 1960 and 1974 (App. 50ex).

2. Evidence established the participation of both Brown and Nicely in the conspiracy.

a. The major gypsum board producers, including National, engaged in a pattern of predatory conduct against Texas Gypsum Company, a small producer, from 1960 to 1965, because Texas Gypsum refused to adhere to the uniform delivery terms adopted by the major producers.[3] After Texas Gypsum made its first sale in the Dallas

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[1]"App." refers to the Appendix in the court of appeals.

[2]Nicely's position was changed from corporate vice-president to divisional vice-president in July 1968 (App. 49ex), but his responsibility with respect to sales of gypsum board (including a "consultant" function relating to prices (App. 3381a-3383a)) remained unchanged (App. 3374a-3380a).

[3]See generally the testimony of Claude Huckleberry, founder and former president of Texas Gypsum (App. 929a-1076a). Specific references to National's participation in the predatory practices appear at App. 938a, 942a, 1689ex, 947a-949a, 955a, 1023a.

market to Groves Lumber Company in December 1961 (App. 888a-889a, 936a), the manager of Groves, John Tinsley, was visited by a National salesman, who asked for a sample of the Texas Gypsum product (App. 893a-894a), and then by Nicely himself in March 1962 (App. 895a-897a). Tinsley asked Nicely why Texas Gypsum was "given such a bad time" in every market that they entered. Nicely replied that "there was a policy of containment aimed, directed at Texas Gypsum Company," and further that "they knew what the cost was of Texas Gypsum Company, their manufacturing costs, and they knew what they had to get it down to where they could keep him out of the market" (App. 898a).[4]

b. In 1965 the gypsum board industry suffered from substantial overcapacity (App. 1215a, 67ex, 71ex), declining demand (App. 1215a),[5] and increasing competition from new producers (App. 1215a, 389ex-390ex), which had led to widespread discounting, extended credit terms, and competition in delivery services and allowances (App. 3587a, 67ex, and 480ex). Despite this market disequilibrium, between November 17 and December 2, 1965, all of the major gypsum producers announced a strict no-discount policy on prices, effective December 15, 1965 (App. 557ex-566ex). Two months later, between January 25 and February 14, 1966, they announced new, identical cash discount and credit terms, and the elimination of extended credit terms for all buyers, effective March 1, 1966 (App. 1036ex-1046ex).

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[4]Tinsley was so upset by that statement that thereafter he purchased gypsum board only from Texas Gypsum (App. 901a-902a).

[5]Industry sales fell nearly 9 percent from $354.7 million in 1964 to $323.6 million in 1965, and continued down to $312.4 million in 1966 (calculated from App. 50ex).

Executives of United States Gypsum Company considered their December 1965 pricing strategy so risky that they sought prior approval of it from their board of directors, an unprecedented step (App. 3228a-3229a, 582ex-589ex). Petitioners testified that their decision to follow this United States Gypsum pricing lead was made within hours of its public announcement (App. 3459a-3460a, 3465a, 3591a);[6] internal National documents, which petitioner Nicely admits he helped to prepare (App. 3459a-3460a), show that National had prior notice of it.[7] Petitioner Brown had spoken several times with Graham Morgan, then president of United States Gypsum, during 1965, to discuss patent litigation and "other subjects of mutual interest" (App. 3467a-3468a, 3503a, 643ex, 3489a). Brown admitted deciding to centralize in him-

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[6]Compare this precipitous decision with the elaborate consideration petitioners gave to following a relatively simple list price increase. App. 2580a-2581a, 2174ex-2176ex.

[7]These documents, three drafts of a "Plan of Action" for National's own announcement, show that National intended to procure United States Gypsum's announcement and full price list on November 17 (App. 594ex-596ex). Securing those documents from dealers by that date would have been feasible if United States Gypsum had published its announcement, as earlier planned, on November 15 (App. 442ex, 451ex, 459ex). Petitioners assert that one of their field personnel in Chicago secured a copy of the announcement and an internal United States Gypsum memorandum from a dealer on the morning of November 17, dictated their contents to National's headquarters by telephone, and then mailed them in (App. 1588a, 2554a-2556a, 3460a, 3590a-3591a, 609ex-613ex). The announcement, however, was not sent out by United States Gypsum until November 17 (App. 557ex), and according to the postmark the National employee did not mail his copy to headquarters until the afternoon of November 18, when he sent it airmail special delivery (App. 2559a-2560a, 613ex).

These documents were the basis for finding National liable in *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 321-323 (N.D. Cal.).

self authority to allow discounts (App. 3591a-3592a), a step United States Gypsum also had taken but had not made public (App. 1152a-1155a, 459ex).

Upon implementation of their no-discount policy in December 1965, United States Gypsum, National, and Georgia-Pacific[8] began to keep a very close watch on prices (App. 1573a, 481ex, 612ex), and National adopted a new form for its personnel to report competitive activities (App. 1572a-1573a, 812 ex). In order to implement the no-discount policy, the major producers ignored the competition of the minor or "single-plant" producers.[9] When some other major producers began to meet the single-plant competition on a spot basis in May 1967 (App. 2569a-2570a, 1374ex), petitioner Brown ordered a $2 reduction in National's list price (App. 3568a-3570a, 2125ex-2126ex). The reduction was limited to items subject to single-plant competition (App. 2676a-2678a), and the announcement made it clear that National intended to continue to sell only at list price (App. 2125ex). National initiated price increases of $3.75 in the East and $2.25 in the West later in the year (App. 2574a-2576a), which were followed with some adjustments (and very little discounting) by the other major producers (App. 1329ex-1330ex, 1375ex-1381ex).

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[8]Georgia-Pacific Corporation, the third largest producer, had announced its price change simultaneously with National on November 24, 1965 (App. 559ex-560ex).

[9]The theory of the major producers was that the smaller ones simply did not have the production capacity to make a refusal to compete unprofitable (App. 480ex, 1573a-1574a, 816ex-818ex). The policy of not meeting "single-plant" competition, adopted by United States Gypsum (App. 458ex-459ex), was also followed by National (App. 811ex) and Georgia-Pacific (App. 839ex) although it was never made public (App. 1154a).

United States Gypsum and National also had been troubled by competition in credit policies and had been conducting studies of those policies during 1965, while Morgan and petitioner Brown were meeting (App. 892ex-911ex, 931ex, 589ex, 954ex-962ex). In August 1965, when National's treasurer protested to Brown that a tightening of credit terms was not feasible because of competitive pressures, Brown replied that (App. 1893a-1894a, 3617a-3621a, 896ex):

> * * * a decision of this nature concerning the industry falls within the prerogative of the Parent Company top management supported by the Senior Vice President of Sales [John Brown] whose function is one primarily directed to industry relationships.

On December 10, 1965, petitioner Brown met with Robert Fredericks, head of Georgia-Pacific's gypsum division (App. 3549a-3551a, 34ex, 36ex, 636ex), and the same day issued a memorandum instructing his aides to expedite work on new credit terms (App. 915ex).

Fredericks went on to meet with defendants Morgan and Andrew Watt, Executive Vice President of United States Gypsum (App. 1123ex), and about January 20, 1966, reported to his superiors that credit terms were being studied both in Georgia-Pacific's gypsum division "and in the industry" (App. 1396a-1398a, 943ex-944ex). United States Gypsum publicly announced its revised terms on January 26, 1966 (App. 1046ex). National followed suit only six days later (App. 1036ex-1037ex).

Petitioner Nicely was involved from the beginning in National's planning for revision of credit terms (App. 3456a-3457a, 802ex, 897ex). Credit personnel sought his concurrence (App. 3622a-3623a, 895ex), and he approved both the new credit terms and the transition policy (App.

1053ex). Both the earlier draft credit terms and the transition program finally adopted had significant unpublished provisions identical to those being considered or adopted by National's competitors,[10] and one policy memorandum approved by Nicely showed on its face contacts with competitors (App. 1055ex-1056ex).

The credit terms adopted by the major producers effective March 1, 1966, were maintained until the time of the indictment (App. 1425a, 1960a, 2020a-2021a, 2131a-2132a, 2069ex).

c. It was the practice of National and the other corporate defendants during the 1960s and 1970s to exchange current price and credit term information. This practice, which continued at National until at least 1971 (App. 1722a, 2024a-2025a, 1117ex), had both the purpose and effect of stabilizing prices (App. 547a-549a, 1518a-1520a, 1695a-1697a).

Brown and Nicely approved the exchange of price and credit term information with competitors (App. 1706a, 1709a, 3398a-3401a). Contrary to his present assertion (Pet. 7), petitioner Brown was aware that the practice was not being used merely to establish a defense to a charge of price discrimination or to protect against sharp bargaining by customers. He knew that prices were being exchanged while National had a policy of not deviating from

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[10]United States Gypsum, National and Georgia-Pacific all considered, but rejected, the use of a one percent penalty for late payments (App. 1397a-1398a, 943ex, 1903a-1904a, 2131ex, 953ex), and the transition programs for the major companies were virtually identical, though their terms were never publicly announced (App. 1922a-1997a, 1048ex para. 3, 1051ex-1061ex). One document from National's files (App. 1050ex) shows a number of items of non-public information from United States Gypsum, including the latter's transition policy (compare para. 3 with 1048ex), the number of outstanding extended accounts (para. 7 with 961ex-962ex), and the existence of a grace period for mailing (para. 8 with 1047ex).

its list prices or standard credit terms, and he had assumed the sole power to authorize such deviations (App. 1709a, 3555a-3557a, 3562a-3563a). Consequently, the exchange of price information would have detected price cuts by competitors but could not have been used to establish a defense to price discrimination charges.

Nicely admitted that he was aware of the practice from 1965 to 1969 (App. 3401a), and his present contention that he never specifically directed price verification (Pet. 12) is contradicted by the testimony of one of his former subordinates (App. 1705a-1706a).

3. The court of appeals observed that it did not view the government's case skeptically, and it stated that there was evidence to support the government's position that the defendants had conspired with the purpose of stabilizing prices (Pet. App. 9a, 11a). The court remanded the case for a second trial, however, holding that the district court had committed the legal errors discussed in our petition.

ARGUMENT

1. Petitioners contend that no evidence at all was introduced to support their convictions (Pet. 16). They argue that the court of appeals should not have ordered a second trial. There is no reason for this Court to consider petitioners' arguments. The evidence recited above, when taken in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), amply supported the jury's finding that petitioners knowingly participated in the conspiracy to fix the prices and terms of sale of gypsum board. It also established that petitioners' participation continued into the five-year period of limitations before the indictment; petitioners adhered to terms agreed upon and their agreement to exchange information on pending sales, which served as a means of policing compliance

among the conspirators. Because their deeds extended into the period of limitations, the jury was entitled to consider their acts throughout the duration of the conspiracy.

The jury was not bound by the self-serving protestations of innocence cited in the petition or by the absence of direct evidence of an agreement among the conspirators. "It is elementary * * * that conspiracies are seldom capable of proof by direct testimony and may be inferred from those things actually done" (*Eastern States Lumber Association* v. *United States*, 234 U.S. 600, 612). See also *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 211.

Petitioners' contentions boil down to a routine assertion of factual error, and "review would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270. Moreover, the court of appeals has not rendered a final decision against petitioners; it reversed their convictions and remanded for a new trial. If this Court should grant review in No. 76-1560 to consider the court of appeals' legal conclusions, and if it should reverse the court of appeals' judgment, that court would be free to consider more fully petitioners' evidentiary arguments, which it did not discuss in detail in light of its reversal on other grounds.[11] See *United States* v. *Pomponio*, 429 U.S. 10, 13. This Court need not consider the ordinary evidentiary contentions raised by petitioners.

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[11]The court noted that the government had shown deliberate antitrust violations (Pet. App. 9a, 11a). Petitioners infer from a comment of Judge Hunter that the court of appeals considered the evidence against Brown to be weak (Pet. 4-5, referring to Pet. App. 27a). The other two judges, however, dissociated themselves from that part of Judge Hunter's opinion (Pet. App. 24a n. 11), and Judge Hunter himself did not suggest that the evidence concerning Brown would not be sufficient to support a conviction under a proper charge.

2. Petitioners' further contention (Pet. 24) that the court of appeals "perpetuated" an "erroneously retroactive application" of the Sherman Act by the district court is groundless.

Petitioners argued in the lower courts that the exchange of information among competitors on pending price offers did not violate the Sherman Act if done in good faith for the purpose of establishing a "meeting competition" defense under Section 2(b) of the Robinson-Patman Act, 38 Stat. 730, as amended, 15 U.S.C. 13(b), or of protecting against "customer fraud" (Pet. 26). The district court rejected this proposition. It instructed the jury that such an exchange of information could constitute a violation if it had either the purpose or the effect of stabilizing prices, and that a good faith purpose of establishing a Robinson-Patman defense would negate an unlawful intent but would not be a defense if the exchange had the effect of stabilizing prices (Pet. App. 11a n. 6). A majority of the court of appeals reversed because it concluded that exchanges of price information for the purpose of "complying" with the Robinson-Patman Act would not be illegal under certain circumstances even if prices were stabilized.[12]

The court of appeals did not create new "retroactive" law in rejecting petitioners' contention that a good faith intent to take advantage of the "meeting competition"

[12]The court of appeals held that (Pet. App. 23a):

> • • • appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue.

defense under the Robinson-Patman Act is a complete defense to a Sherman Act charge. This Court held in 1921 that an exchange of price information among competitors regarding specific prices for specific customers is illegal if it has a tendency to stabilize prices and suppress competition. *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 400. Accord, *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 389.

Any reliance petitioners may have placed on *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563, and *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, was unwarranted. Both *Maple Flooring* and *Cement* emphasized that the price information exchanges involved there were limited to completed transactions and had no tendency to suppress competition. *Maple Flooring*, *supra*, 268 U.S. at 585-586; *Cement*, *supra*, 268 U.S. at 604-606. Thus, when this Court held in *United States* v. *Container Corp. of America*, 393 U.S. 333, that an agreement to exchange price information that resulted in stabilizing prices violated the Sherman Act regardless of the intent behind the exchange, it was not establishing new law but merely applying long-established principles to the particular facts of that case. It is no novel doctrine that "a good intention will not save an otherwise objectionable regulation" (*Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238).[13]

[13]Our petition in No. 76-1560 contends that the court of appeals' decision is more favorable to petitioners than prior decisions of this Court warrant. The four-part test of which petitioners complain (Pet. 31-32) establishes a *defense* for price exchanges that are otherwise criminal, not a new basis of liability. The defense so established is not justified. Moreover, the first of the other cases cited by petitioners as validating their price exchange agreement (Pet. 26 n. 3) was not decided until 1971 and had no effect on their practices. This Court has

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

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not, in any event, endorsed any of those cases, and petitioners were not entitled to rely on them.

Petitioners suggest that "the Sherman Act itself is so vague that it inadequately defines the elements of the crime with which defendants were charged" (Pet. 28 n. 6). That proposition has long since been decided adversely to them. *Nash* v. *United States*, 229 U.S. 373, 376-378. Even if the law were less clear than it is, it would not be unconstitutional as applied to petitioners.

> • • • Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

United States v. *Wurzbach*, 280 U.S. 396, 399. See also *United States* v. *Powell*, 423 U.S. 87, 93. Petitioners knowingly came close to, and indeed overstepped, the line separating the legal from the illegal. That line has not undergone an avulsive change making the rule less favorable to petitioners (cf. *Marks* v. *United States*, No. 75-708, decided March 1, 1977). The most petitioners can say is that the law has gradually become more clear. That, however, is often true in criminal cases, and it is not a sufficient reason to withhold application of the criminal sanction.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1556

COLON BROWN and J. P. NICELY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY MEMORANDUM OF PETITIONERS

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REPLY MEMORANDUM OF PETITIONERS

The brief for the United States opposing the Joint Petition for a Writ of Certiorari in this cause is itself an eloquent example of why certiorari should be granted. The Court is here asked to review the convictions of Petitioners which were based on a stale and spotty pastiche of events occurring long before the period open to the prosecution under the applicable statute of limitations—convictions, moreover, which were obtained pursuant to an erroneous rule of law applied retroactively.

A grave constitutional injustice was committed against Petitioners. At issue here is whether two private individuals, contrary to the Constitution and laws of the United States, can be convicted on mere innuendo in a case where even the prosecution admits that no evidence exists of any illegal activity on their part within the statutory period.[1]

PRICE VERIFICATION AND RETROACTIVITY

In the face of a half century of precedent to the contrary, Respondent argues that price verification (in which both Petitioners had only tangential involvement prior to the statutory period and none thereafter) amounts to price fixing under the Sherman Act, regardless of the lawful purpose of such verification, if there is a stabilizing effect on prices. The Court of Appeals for the Third Circuit correctly held that Petitioners and the other appellants were unfairly convicted under an erroneous instruction which precluded the jury from considering lawful purposes for the limited verification which did occur. However, the Court of Appeals incorrectly failed to enter judgment for Petitioners Brown and Nicely and, instead, remanded for a new trial under an even more stringent rule of law on price verification than had been applied previously by any other Court of Appeals. Thus, without the

[1] When the Director of Operations of the Antitrust Division finally approved the filing of the indictment against the individuals, he did so even though he recognized that because of the lapse of time the "evidence" with respect to proposed individual defendants fell short of identifying specific affirmative acts in furtherance of the alleged conspiracy within the five-year period. (DX Q-39).

intervention of this Court, Petitioners, both of whom are now retired and in their late sixties, face another long and arduous fight to prove their innocence in a foreign forum.[2]

Petitioners contend that they cannot be retried under a new rule of law now fashioned by the Court of Appeals out of this Court's holding in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). To do so would perpetuate the trial court's unconstitutionally retroactive application of a new *Container* rule in violation of due process and fundamental fairness. (See *Stanley Marks* v. *United States*, 45 U.S.L.W. 4233 (1977), and Petition for Certiorari, pp. 24-32).

Respondent contends that its reading of *Container* as outlawing price verification regardless of lawful purpose is not inconsistent with prior law, and therefore can be applied retroactively. The basis of Respondent's position is its erroneous argument that the price exchanges held lawful in *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563 (1925), and *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588 (1925), had "no tendency to suppress competition." (Brief in Opposition at 11). On the contrary, this Court specifically recognized in *Cement* that the exchanges "tended to produce uniformity in price." (268 U.S. at 593). *Cement* extended *Maple Flooring*, which also allowed

[2] The "relief" accorded to petitioner J. P. Nicely by the Court of Appeals is particularly poignant. Rather than undergo another tortuous four-month trial, Mr. Nicely moved only for judgment of acquittal, not a new trial, but the Court of Appeals ignored his plea and ordered a new trial for him as well as the other defendants.

price information exchanges, by holding that reciprocal communications between competitors of the prices at which cement was sold under "specific job contracts" were permissible under the Sherman Act even where they related to specifically identified jobs and customers. Such exchanges were approved, despite the trial court's express finding that they tended to produce uniformity in price, because their purpose was to protect against buyer fraud. (268 U.S. at 603-04). Since both *Cement* and *Maple Flooring* involved price exchanges which had a stabilizing effect on prices, to read *Container* as outlawing such exchanges in the face of proof of lawful purpose would create a new rule of law which cannot be applied retroactively. Therefore this Court should grant certiorari to consider the important constitutional implications of applying a rule just fashioned to govern Petitioners' pre-1969 conduct.

PETITIONER COLON BROWN

In addition to objecting to the retroactive application of a new rule of law, Petitioner Colon Brown has sought a writ of certiorari in this case because of the total absence of probative evidence sufficient to support the conviction against him. That lack of evidence was noted by Judge Hunter who wrote the majority opinion of the Court of Appeals. Judge Hunter made a special point of noting expressly that the only possible references in the record which might conceivably link Colon Brown to the alleged price-fixing conspiracy related to a time almost three years prior to the beginning of the statutory period. (Petition Appendix at 27a; 550 F.2d 115, 128 (3rd Cir. 1977)). In its Brief opposing certiorari, Respondent has offered nothing to contravene Judge Hunter's observation. Instead, this Court is offered by Respondent, as have been the two courts below, a series of stale, prestatutory events, none of which show that Colon Brown participated in any way in the conspiracy charged and none of which relate to the statutory period. The central element of Respondent's claim that Colon Brown was involved in the alleged conspiracy was a price increase in December 1965 by National Gypsum following the lead of the largest company in the industry, United States Gypsum. In Respondent's only effort to connect Colon Brown with that allegedly conspiratorial price change, it has relied on a series of meetings in 1965 between Mr. Brown and officials of United States Gypsum. However, Respondent is not able to cite any evidence of illegal conduct by Mr. Brown in the matter. Instead, the prosecution and now Respondent have relied solely on unsupported assertion and innuendo. The actual evidence, which was not impeached or contradicted, was that Colon Brown did indeed meet with certain officials of United States Gypsum during 1965 but that these meetings were held pursuant to encouragement by a United States district court in an effort to settle some patent infringement cases then being litigated by the two companies. (Third Circuit Appendix at 2551a, 3467a).

In spite of the clear and unchallenged evidence of the legitimate purpose and content of those 1965 meet-

ings between Mr. Brown and USG officials, the Government at trial, during the Third Circuit appeal, and now before this Court has continued to press the alleged case against Colon Brown on the spurious ground that because he *could have* engaged in conspiratorial discussions with USG officials he must be deemed actually to have done so. (Brief in Opposition at 4).

Moreover, by Respondent's own account, the 1965 price increase did not last into the statutory period because of a nationwide price *decrease* by National in May 1967, a decrease which was ordered by Colon Brown himself. (Third Circuit Appendix at 3568a). Clearly, the remote events of 1965, even if viewed through the distorted perspective advanced by Respondent, cannot support Colon Brown's conviction for a conspiracy allegedly continuing into the statutory period.

Similarly, the change in credit terms of March 1966, on which National again followed the lead of other gypsum producers, presents no probative evidence of guilt as to Colon Brown. The record shows only that when one gypsum producer announced the adoption of new credit terms, other companies, including National, announced on different dates the adoption of similar terms.

Colon Brown's interest in the general subject of credit terms was superficial at best and was generated by an internal company memorandum written on August 7, 1965, by a subordinate employee concerned with production schedules in the plants. The memorandum was written long before the March 1966 credit change,

and pointed out that National's credit policies encouraged customers to defer orders until late in the month so as to obtain extended payment terms, thereby creating problems with plant production schedules. (Third Circuit Appendix at 892 ex).

As a result of that memorandum in August 1965, Colon Brown, who had recently become Chairman of the Board and Chief Executive Officer of National, ordered "an objective analysis" of the problem and stated, "If this is costing profits, then let's act." (Third Circuit Appendix at 894 ex). Over the following several months a number of alternatives were considered. USG's credit change announced in January 1966 to become effective March 1 bore little resemblance to the various credit plans which National had been considering. National, however, in the exercise of its own business judgment and in order to remain competitive, followed USG's lead by announcing its credit change on February 1.

No evidence exists to show that Colon Brown discussed National's change in credit terms with representatives of any other gypsum producers. There is absolutely no evidence that he had any advance knowledge of USG's plans. Respondent relies primarily on an ambiguous entry in Colon Brown's desk calendar for the assertion that he met with a Mr. Fredericks of Georgia Pacific, during which meeting he must have discussed a credit change. Mr. Fredericks, under direct examination by the prosecutor, remembered no such meeting (Tr. 5169) and testified that he was only generally aware of credit problems as a whole. (Tr. 5194).

Just as with the 1965 price change, the 1966 credit change did not last long at National, and was substantially modified prior to the statutory period.

Finally, as Respondent's Brief in Opposition tacitly admits, Colon Brown was truly removed from the issue of price verification. (Brief in Opposition at 7). There is nothing in the record to show that Colon Brown had any knowledge of what other gypsum producers did with respect to verification. The only testimony cited by Respondent in an attempt to link Mr. Brown with verification was that of Earl Kroth, who testified that Mr. Brown knew verification calls had been made but that this occurred "somewhere in about late '66 early '67." (Third Circuit Appendix at 1709a). Mr. Kroth himself testified later that verification calls ended at National by the time the statutory period was beginning. (Third Circuit Appendix at 1717a). There is no evidence in the record that Colon Brown had any knowledge whatsoever of a single verification call by anyone at National at any time within the statutory period.

Colon Brown does not come before this Court arguing "routine assertion of factual error" as Respondent contends. (Brief in Opposition at 9). Instead, Mr. Brown seeks to call this Court's attention to "a record lacking any relevent evidence as to a crucial element of the offense charged. . . ." (*Vachon* v. *New Hampshire,* 414 U.S. 478, 480 (1974)). Respondent's failure in its Brief in Opposition to cite substantive evidence of participation by Colon Brown in the conspiracy charged, both before and during the statutory period, requires that his Petition for a Writ of Certiorari be granted.

PETITIONER J. P. NICELY

Just as with the alleged case against Colon Brown, it is obvious from the Respondent's Brief opposing certiorari that the Government has nothing to support the conviction of Petitioner J. P. Nicely other than three stale, misleading, and unrelated episodes all occurring prior to the statutory period. In its Brief, Respondent exposes the pathetic weakness of its case by referring this Court almost immediately to an incident which occurred in March 1962—fully six years prior to the commencement of the statutory period. That was a visit which Mr. Nicely made in a sales capacity to Groves Lumber Company in Dallas, Texas. Respondent refers to a conversation which Mr. Nicely had at that time with a Mr. John Tinsley, Manager of Groves Lumber Company. The content and purpose of that conversation are clearly set forth in the record of this case and offer no basis upon which a charge of conspiracy or predatory conduct by National Gypsum or Mr. Nicely can be sustained. The visit was described in detail in the Joint Petition for Certiorari on page 15. Most importantly, however, Respondent has not been able to show any link whatsoever between this remote and legally innocuous event and the so-called nationwide price-fixing conspiracy alleged in the indictment as having continued into the statutory period.

The second of the three feeble attempts to link Mr. Nicely with the claimed conspiracy involves the same 1965 price increase and 1966 credit change with which Respondent attempted to prop up its non-existent case against Colon Brown. As with Mr. Brown, Mr. Nicely is shown by the record to have been only an incidental participant in the activities related to those events. (*See* Joint Petition for Certiorari at 10, 11). There is

no evidence to show that Mr. Nicely participated in a conspiracy involving either prices or credit at any time, much less in 1965 and 1966. Indeed the evidence shows that his involvement in the 1965 price increase was limited to the preparation of National's own price announcement on the direct orders of his company's president, Mr. Manske. The prosecution never offered any evidence that Mr. Nicely engaged in price-fixing discussions in 1965 or at any other time.

Insofar as the 1966 change in credit terms is concerned, Mr. Nicely's role was shown by the evidence to have been limited to expressing his written opinion from the standpoint of his Sales Department on whether the proposed credit policy would be feasible. (Third Circuit Appendix at 1055 ex, 1056 ex). There is no evidence in the record that Mr. Nicely ever participated in any discussions at National on the credit change, but more importantly there is no evidence that he was in contact with any competitors on the subject.

Regardless of the foregoing, however, the record clearly shows that neither the 1965 price increase nor the 1966 credit change continued at National into the statutory period.

Finally, Respondent completely disregards the record in a third futile attempt to link Petitioner Nicely to the alleged conspiracy through the issue of price verification. That is a practice which Respondent characterizes in its Brief as an "exchange of price and credit term information." (Brief in Opposition at 7). Whatever might be the legal implications of price verification (which has until now been upheld by all United States courts of appeal reviewing the issue when done

for Robinson-Patman Act purposes), there is absolutely nothing in the record to connect Mr. Nicely with price verification in the statutory period.

Mr. Nicely testified without contradiction that he had no direct participation in verification calls, that he had never made a verification call to a competitor or received one from a competitor, and that he had never talked to a competitor about verification of a price. He testified further that he never gave instructions to anyone else with regard to verification of prices with competitors and never asked any employee of National Gypsum to make a verification call. (Third Circuit Appendix at 127a-128a, 134a, 140a).

In its Brief opposing certiorari, Respondent refers to this and other related testimony as "self-serving protestations of innocence." (Brief in Opposition at 9). What Respondent ignores is that Mr. Nicely's testimony is the only evidence in the record regarding the subject. What Respondent also conveniently ignores is the undisputed evidence of record that the sole initiative taken by Mr. Nicely relating to verification was his suggestion to Mr. Kenneth Atwell of the company's Sales Department that the practice of verification be discontinued when, in January 1969, he read in the newspaper of this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). (Third Circuit Appendix at 132a-133a).

Throughout this proceeding Mr. Nicely has consistently maintained that he did not participate in any conspiracy in violation of the antitrust laws. Beyond that, however, the failure by the prosecution and Respondent to offer any evidence of his involvement in a conspiracy either before or during the statutory period raises fundamental questions of constitutional scope.

As in *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), the so-called case against Mr. Nicely is not one involving mere sufficiency of the evidence, as Respondent would have this Court believe, but instead is one involving "whether this conviction rests upon any evidence at all." (362 U.S. at 199).

Respondent raises as another objection to granting certiorari here the argument that no final judgment has been entered against Mr. Nicely because the appellate court reversed and remanded for new trial. (Brief in Opposition at 9). This is a novel argument on the part of Respondent since it, too, has petitioned this Court for certiorari in this matter under the caption *United States* v. *United States Gypsum Company, et al.*, No. 76-1560.

The opportunistic inconsistency of Respondent's argument here applies with equal force to both Petitioners Brown and Nicely. However, there is an added irony with regard to Mr. Nicely since, as noted at the outset of this Memorandum, his appeal to the Third Circuit as well as his petition for certiorari have made it abundantly clear that he has not sought the remedy of a new trial but instead has consistently urged review of his conviction solely on the grounds of lack of evidence.

CONCLUSION

For the reasons stated, the Joint Petition for Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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